European Securities and Markets Authority

Review of the clearing thresholds under EMIR

Discussion Paper

22 November 2021 | ESMA70-156-5010

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 **19 January 2022.**

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 'Data protection'.

Who should read this paper?

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from financial and non-financial counterparties entering into OTC derivative transactions, as well as from central counterparties (CCPs).

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 and update them where necessary, in order to ensure that the thresholds remain appropriate. That periodic review should be accompanied by a report.

Contents

This report is divided into 12 sections. Section 1 is the introduction and sets the context and walks the reader through the different aspects covered in this discussion paper. Section 2 explains the purpose of this discussion paper. Section 3 presents the relevant information on the data and methodology and on how the different sources of information used in this report have been treated.

Section 4 covers the clearing regime under EMIR and focuses on how counterparties calculate their positions in OTC derivatives for the sake of determining whether they are above or below the clearing thresholds. Section 5 touches upon the impact of Brexit and the international perspective on the EMIR regime, looking at the consequences of Brexit for the clearing thresholds and the regulatory requirements triggered when those are exceeded.

Section 6 provides a market overview on how the state of application of the clearing obligation and its evolution. Section 7 focuses on the information gathered from notifications on the clearing obligation submitted to ESMA by counterparties. Section 8 gives an overview of the clearing thresholds applied to the different asset classes (i.e. credit derivatives, interest rate derivatives, commodity derivatives, equity and currency derivatives). Section 9 compiles the information on the outcome inferred from the data analysis on the application and impact of the current clearing thresholds.

Section 10 presents simulations on the changes to the population of counterparties captured and notional traded above the clearing thresholds by modifying the current thresholds for the different asset classes and types of counterparties.

Lastly, section 10 covers the conclusions derived from this discussion paper and Annex I includes the summary of questions.

Next Steps

ESMA is inviting stakeholders to provide feedback on the topics presented in this discussion paper by 19 January 2022. The feedback received will be carefully considered and ESMA will then take it into account when preparing a follow-up report.

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1 Introduction

1. EMIR sets-up the clearing regime regarding over-the counter (OTC) derivatives and indicates which counterparties are subject to the clearing obligation, at what point in time and for which classes of OTC derivatives. Currently the clearing obligation covers certain interest rate derivatives (IRDs) and credit derivatives.

2. The amendments introduced in EMIR[1] by Regulation (EU) 2019/834 (referred to as EMIR Refit)[2], have modified the clearing regime. While the classes subject to mandatory clearing (and the procedure to determine which classes are fit for the clearing obligation) remained the same, the way in which one can determine the counterparties subject to the clearing obligation has changed. More specifically, EMIR Refit has modified the use of the clearing thresholds, triggering the clearing obligation when a financial (FC) or a non-financial (NFC) counterparty exceeds them, based on a specific calculation framework.

3. In view of this change, EMIR Refit introduces a mandate for ESMA to periodically review[3] the clearing thresholds and update them where necessary, in order to ensure that the thresholds remain appropriate (e.g., to take account of any material changes in financial markets). That periodic review should be accompanied by a report.

4. To fulfil this mandate ESMA has produced an assessment of the population of counterparties subject to mandatory clearing with the objective to review whether the clearing thresholds are well-calibrated both in terms of notional cleared and in terms of market participants dealing with OTC derivatives and that fall under the clearing obligation.

5. Therefore, this review is centred on the overall appropriateness of the thresholds and their impact in the different derivative markets. The report is using 2020 data. At the same time, this report also considers some of the implications of clearing thresholds beyond the obligation to start centrally clearing. These elements, although not core to the scope of this paper, to a certain extent can be considered intertwined with the discussion and merit attention.

6. To exceed one or more of the clearing thresholds means for NFCs not only becoming subject to the clearing obligation but also becoming subject to additional risk-mitigation techniques under EMIR, notably to apply risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts[4] (bilateral margining). The requirement to exchange collateral

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[1] 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 (Text with EEA relevance)
[2] EMIR consolidated text can be found here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02012R0648-20210628
[3] Article 10(4) of EMIR.
[4] See Article 11 of EMIR on Risk-mitigation techniques for OTC derivative contracts not cleared by a CCP.

implies the posting of variation margin and initial margin as set under the commission delegated regulation on margining[5].

7. Furthermore, the departure of the United Kingdom (UK) from the European Union (EU) has had consequences for financial markets, including with respect to derivative markets with some implications on the clearing regime framework. Under EMIR[6], without an implementing decision from the European Commission declaring a third-country market equivalent to an EU regulated market, derivatives contracts traded in that third-country are qualified as OTC. In the absence of such an equivalence decision, derivatives executed on UK Markets (which were EU regulated markets before Brexit), as from January 2021 are considered OTC. Consequently, these OTC contracts must be included in the calculation of counterparties' positions against the clearing thresholds (unless the hedging exemption applies), and this has an impact on entities that may suddenly become subject to the clearing obligation and possibly other collateral requirements.

8. ESMA is aware of the challenges that some entities, NFCs in particular, may face as a result of this issue. At the same time, we note that the Commission is the one responsible for determining the equivalence of third country markets. Following from this, this document provides an opportunity to stakeholders to provide relevant data and information on any concerns market participants may share in this respect.

9. These additional elements will be reviewed in conjunction with more up-to-date data before drawing conclusions. In parallel to the analyses of the responses to this discussion paper, ESMA will thus look at data from 2021 to better assess how Brexit could have impacted counterparties subject to EMIR with respect to their OTC derivative activity.

10. Likewise, we also acknowledge that counterparties subject to EMIR have had to adjust to a significant number of changes (beyond Brexit) over the past years, in particular the entry into force and implementation of EMIR Refit, the phasing-in of requirements for initial margin or the progressive introduction of new benchmarks in OTC derivative contracts. All these issues have been dealt with separately from a policy perspective and have required a certain degree of adaptability from market participants. In this context with several adjustments occurring in a short period of time, the review covered in this document is an opportunity to observe from the perspective of the clearing thresholds (and their regulatory implications) how some of these changes already implemented are shaping practices in OTC derivative markets and to assess how EMIR requirements are positioned from a comparative perspective in relation to other jurisdictions with similar regulatory frameworks. With this in mind, this paper in addition

[5] Commission Delegated Regulation (EU) 2016/2251of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (Text with EEA relevance): https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2251&from=GA

[6] See Article 2a of EMIR on Equivalence decisions for the purpose of the definition of OTC derivatives.

to being a review of the clearing thresholds is thus a preliminary assessment that can feed into the exercise ESMA will conduct to deliver a broader report to the Commission[7] in 2023 that will also investigate clearing levels for FCs and NFCs and the distribution of clearing within each type of counterparty.

11. This report presents statistics on the impact of the current clearing thresholds when looked into at the level of the group structures, the level of the counterparties, FCs and NFCs separately and across the different asset classes. Additionally, we have included some projections or simulations to illustrate the changes in terms of notional traded in each asset class and also in terms of the percentage of population of counterparties that would potentially be above the clearing thresholds if the thresholds were set at a different level (decreasing them by 0.5 billion euros or increasing them by 0.5 billion and 1 billion euros respectively).

2 Purpose

12. This document is both a report, presenting ESMA's analysis of the current situation, and a discussion paper, in order to receive input from stakeholders on a range of topics relevant in the context of a review of the clearing thresholds.

13. In this document, ESMA presents an analysis of the population of counterparties and groups subject to the clearing obligation after the entry into force of the EMIR Refit. The purpose of this paper is two-fold; on the one hand, to map the population that is currently subject to mandatory clearing to ultimately assess if the clearing thresholds are fit for purpose after the changes introduced in EMIR. And on the other hand, to assess if a revision of these thresholds would be beneficial to better tackle the systemic risk linked to OTC derivative trading activity, while preserving the clearing obligation as one of the pillars for financial stability in OTC derivative markets.

14. This document presents statistics based on the data available to ESMA that show the split of counterparties subject to the clearing obligation (FCs and NFCs) and the impact of the current clearing thresholds on the different derivative asset classes (commodity, credit, currency, equity and interest rate) in terms of percentage of entities captured and also in terms of percentage of notional traded captured for each of the classes.

15. Furthermore, the simulations included in the paper give an indication of how the population of counterparties subject to the clearing obligation could change if the current clearing thresholds were slightly modified, which allows to better understand the sensitivity of modifying the current thresholds slightly and to observe if such a change would affect the efficiency of the clearing regime.

[7] Article 85 (1a) of EMIR on Reports and review. The report is due in June 2023.

16. The aim of this first report is not to consult on a defined proposal for the change of the clearing thresholds, but to have a first description of the current situation and how thresholds are working in practice as the basis for discussion. We are open to receive input from stakeholders on various elements related to the clearing thresholds and on the analyses provided on the overall framework.

17. For example, the type of feedback that could be interesting to receive from stakeholders could provide arguments and supporting data on whether the current framework is considered to work adequately and efficiently for both FCs and NFCs or maybe for only one of the two categories of counterparties. In addition, feedback is sought how to make that distinction in order to improve the effectiveness of the clearing thresholds. The feedback might also consider different approaches in the review for different asset classes to ensure the most efficient calibration of the thresholds, with the aim of mandating clearing for those counterparties that can pose greater systemic risk and at the same time capturing the highest percentage possible of notional traded in each derivative asset class. It would also be interesting to receive arguments and feedback from stakeholders on whether the clearing thresholds are well-calibrated and fit for purpose.

18. In addition, any potential revision of the clearing thresholds should strike the right balance between the need to manage the systemic risk associated to the activity of FCs and NFCs and at the same time consider the principle of proportionality in the application of EMIR requirements.

19. For this purpose, the paper describes the current regulatory framework and the clearing regime under EMIR, explains the sources of information used, the methodology applied when treating available data and the assumptions taken for the preparation of the statistics and simulations included.

20. After the consultation period, ESMA will consider the feedback received from stakeholders and will proceed with a report that takes into account the input provided.

21. Last but not least, in line with EMIR, ESMA regularly consults the ESRB on the various policy choices related to the clearing obligation. This is also true for the review of the clearing thresholds. ESMA will use this report as the base document to consult the ESRB and to receive their input on the review of the thresholds.

3 Data and methodology

3.1 Sources of information used in the report

22. For the purpose of reviewing the clearing thresholds ESMA has used three different sources of information:

- Data reported to TRs registered in the EU;
- Information in the GLEIF Level 2 data on relationship data for legal entities;
- Information received through the notifications counterparties submit to ESMA under Art. 4a(1) and Art. 10(1) of EMIR.[8]

23. ESMA is conducting an analysis and a mapping of the counterparties that are today subject to the clearing obligation using EMIR data from Trade Repositories (TRs); in this case we used EMIR trade state data, together with information submitted by the counterparties in the notifications mentioned above. In addition, information from GLEIF was used when available to verify group's structures.

24. The information from the notifications allows ESMA to classify counterparties by type (i.e., FC/NFC), by sector and by country. In addition, it also allows ESMA to identify entities that belong to the same group thanks to the information provided in the notification regarding the parent undertaking.

3.2 Data

25. EMIR mandates the reporting of all derivatives traded by EEA counterparties to TRs, which centrally collect and maintain the records of all derivative contracts. EMIR data is provided at different levels of granularity to the authorities, with the highest level of granularity being trade activity (also referred to as flow data). TRs also provide a further level of data aggregation, trade-state data, which shows information about only outstanding transactions at the time of aggregation by the respective TR at the end of a given day.

26. For the analysis in this paper, we use EMIR data from TRs to gather information on the positions in derivatives entered into by EEA counterparties and groups. Therefore, we focus on trade state data (reporting data on outstanding trades at the end of a day). In particular, we have used data from 11 trade state reports to compute the aggregate position for each group[9]. For this analysis, we consider only OTC trades (bilateral trades and trades executed on venues other than EU or third country equivalent regulated markets). It is also noted that EMIR includes a double-reporting obligation for EEA entities, i.e. when both counterparties to a trade reside in the EEA, they are both mandated to report the information on the derivative transactions. For this reason, and to prevent doubling figures, we adjust the notional by halving it when both counterparties are domiciled in the EEA.

27. EMIR TR data includes information also on the nature of the transaction, to identify when a transaction is for hedging purposes (i.e. field 15, "Directly linked to commercial

[8] The notification template can be found on ESMA's website, following this link: https://www.esma.europa.eu/files/refitnotification-clearingthreshold-fcsnfcsxlsx
[9] The dates for the Trade State Report are: 10/01/2020, 28/02/2020, 13/03/2020, 10/04/2020, 01/05/2020, 26/06/2020, 21/08/2020, 18/09/2020,02/10/2020,06/11/2020 and 11/12/2020.

activity or treasury financing"[10]), and the nature of the entity (included in field 7, "Nature of the reporting counterparty") to distinguish FCs from NFCs among others. For the statistics presented in this report and taking into consideration the hedging exemption for NFCs, hedge trades have been excluded from the calculation of positions of NFCs.

28. The information on ownership and group structure comes from GLEIF[11] "Level 2" data. When legal entities acquire an LEI, they report their 'direct accounting consolidating parent' as well as their 'ultimate accounting consolidating parent'. This information is stored in the GLEIF database. In addition, in our analysis, as a source of information for group structures we have also used the data on entities' relationship and ownership included in the EMIR notifications.

29. One of the main limitations of the data pertains to the identification of groups and the mapping of subsidiaries. Using the data from GLEIF level 2 and combined with the notifications we map, around 92% of the notional amount and 13% of counterparties appear to be linked to a group. The counterparties for which no direct or ultimate parent was identified are considered as stand-alone entities. Among these, we cannot exclude the possibility that there might still be some entities that belong to a group that could not be identified with the data available. The purpose of this mapping exercise is to have visibility at group level, in line with EMIR, which calculations of positions in OTC derivatives take into consideration trades entered by different entities within the same group. All entities, either subsidiaries belonging to a group, parent entities or stand-alone entities are referred to as counterparties in this report.

30. Another issue is the magnitude of non-EEA entities in EU groups. Entities domiciled in a third country do not have to report to EU TRs the information of the derivatives contracts they enter into and thus are not considered in our calculations. For this reason, also, we complement the information from TR data with the notifications submitted by entities. In addition, it should be noted that any inaccuracies in the TR data used for this report due to misreporting may have an impact on the resulting statistics. For example, an FC reporting to be an NFC or a CCP, empty fields or NFCs wrongly reporting hedging trades are issues that cannot be addressed when treating the data.

31. As our assessment is carried out with 2020 data - with UK counterparties still reporting to EU TRs - we could consider the data reported by the now third-country UK counterparties when computing groups' positions. However, a potential future revision of the clearing thresholds would need to be done considering that UK entities' positions are no longer reported to EU TRs. In addition, the statistics in this paper consider the information submitted through the notifications by EEA counterparties (including positions of third country entities, also the UK, when belonging to a group with

[10] We have removed the records where the field "Directly linked to commercial activity or treasury financing" is populated with "Y". All the records populated with "N" or blank are considered non-hedging transactions.
[11] For more information on the GLEIF database, see https://www.gleif.org/en.

counterparties in the EU). However, after Brexit, ESMA does not receive notifications from counterparties in the UK that are not part of an EEA group. Therefore, and to allow for better comparability in the future, although this paper considers positions taken by entities in the UK as part of EEA groups for the purpose of calculating positions in OTC derivatives, the UK has been removed from the graphs we present. Consequently, this paper only displays data on EEA countries and third-country data (understood as data only referred to third-country entities without a link to EU groups) have been removed.

3.3 Methodology

32. The methodology to assess whether the groups, entities and notional are subject to the clearing obligation is based on several choices derived from the clarifications in ESMA's EMIR Q&A document. The assessment is performed using the information from EMIR TR data and from the notifications reported by entities on their positions against the thresholds.

33. 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.

34. 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 TRs and deducing the transactions entered into for reducing risks directly relating to the commercial activity or treasury financing activity.

35. For each group we then calculate a 12-month average. We compare the resulting number for each asset class with the relevant clearing thresholds to determine whether the amount exceeds the relevant clearing thresholds for any of the asset classes.

36. 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 may or may not be subject to the clearing obligation. When a discrepancy exists between TR data and the notifications submitted by the counterparties, we have privileged the source where a counterparty is considered above the clearing threshold. For example, if a counterparty results below the clearing threshold according to the group activity as reported to TRs but has notified ESMA, it is considered above the clearing threshold.

37. There are a number of possible reasons explaining these discrepancies between the calculations and the notifications, including misreporting of certain fields (e.g. hedging, sector, etc.), 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, or the lack of for certain counterparties. Whereas resolving some of these discrepancies may be more of a supervisory nature in some cases or supervisory convergence nature in other cases, the objective of the work presented in this document is different as it is of a

policy calibration nature, and thus with the aim to look at the overall trends and coverage. Therefore, ESMA's methodology explained here is not aimed at resolving these discrepancies (although work will continue to narrow them down further) nor at ensuring an exact number of entities for each sub-category, but at analysing the overall situation from a risk and volume perspective at macro level.

38. Therefore, ESMA acknowledges certain discrepancies between the data submitted by market participants through the notifications to ESMA and the metrics based on data reported to TRs (especially in relation to NFCs) and will continue working in parallel to the consultation with national competent authorities to further clean the data and facilitate further a common supervisory approach and data treatment. At the same time, ESMA is also reasonably confident that the description presented in this report based on the data available is a good basis for the purpose of a discussion paper. The objective of this document is indeed to receive a first set of feedback from stakeholders on this topic of the clearing thresholds, in particular as some of the questions go beyond the metrics presented and the responses will be a useful input to better assess the situation.

39. Going back to the methodology per se, as a last step, after having identified the groups (and FCs and NFCs belonging to each group) subject to the clearing obligation, we look at their trade-state data, (which shows information about only outstanding transactions at the end of the day) on a chosen date in the last quarter of 2020. We assess the share of groups subject to the clearing obligation, the number of FCs and NFCs and the notional traded on that date.

4 The clearing regime under EMIR

40. EMIR introduced the clearing obligation for certain counterparties and derivatives classes when certain conditions are met. This clearing regime was modified by the amendments introduced by EMIR Refit. Before its review, EMIR established that all FCs were subject to the clearing obligation for the classes of OTC derivatives for which there was a mandate to clear. By contrast, NFCs were only subject to the clearing obligation if they exceeded any of the clearing thresholds established in the Commission Delegated Regulation (EU) No 149/2013 (Article 11), which are:

- EUR 1 billion in gross notional value for OTC credit derivative contracts;
- EUR 1 billion in gross notional value for OTC equity derivative contracts;
- EUR 3 billion in gross notional value for OTC interest rate derivative contracts;
- EUR 3 billion in gross notional value for OTC foreign exchange derivative contracts;
- EUR 3 billion in gross notional value for OTC commodity derivative contracts and other OTC derivative contracts not provided for under points (a) to (d).

41. Amendments in EMIR Refit created a new category of FCs exempted from the clearing obligation, for those FCs which faced more difficulties to access clearing due to their

lower volumes trading OTC derivatives contracts, and with the aim to introduce a higher level of proportionality in the clearing obligation (see table below illustrating the relevant changes). This new category, referred to as FC-, encompasses FCs whose activity in OTC derivatives is below the clearing thresholds. Before EMIR Refit entered into force, the exemption from clearing for entities below the clearing thresholds only applied to NFCs, the so-called NFC-.

42. The reasoning behind this amendment and the regime applicable to FC- is embodied in Recital 7 of EMIR (as amended by Refit):

"Certain financial counterparties have a volume of activity in OTC derivatives markets that is too low to pose an important systemic risk for the financial system and is too low for central clearing to be economically viable. Those counterparties, commonly referred to as small financial counterparties, should be exempted from the clearing obligation, but they should remain subject to the requirement to exchange collateral to mitigate any systemic risk. However, where the position taken by the financial counterparty exceeds the clearing thresholds for at least one class of OTC derivatives, calculated at the group level, the clearing obligation should apply to 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. The financial counterparty should have the possibility to demonstrate at any time that its positions no longer exceed the clearing thresholds for any class of OTC derivatives, in which case the clearing obligation should cease to apply."

4.1 Counterparties subject to the clearing obligation: Calculation of positions in OTC derivative contracts

43. EMIR establishes the way in which counterparties have to determine when they become (or no longer are) subject to the clearing obligation. For that purpose, both FCs and NFCs will calculate their positions in OTC derivatives to identify if they are above or below the clearing thresholds. In addition, EMIR offers the possibility to counterparties to choose not to calculate their positions and, in that case, they will be considered as subject to the clearing obligation.

44. FCs and NFCs have different ways to calculate their positions, as established by Article 4a and Article 10 of EMIR respectively:

Article 4a: Financial counterparties that are subject to the clearing obligation

1. Every 12 months, a financial counterparty taking positions in OTC derivative contracts may calculate its aggregate month-end average position for the previous 12 months in accordance with paragraph 3. Where a financial counterparty does not calculate its positions, or where the result of that calculation exceeds any of the clearing thresholds specified pursuant to point (b) of Article 10(4), the financial counterparty shall:

(a) immediately notify ESMA and the relevant competent authority thereof, and, where relevant, indicate the period used for the calculation;
(b) establish clearing arrangements within four months after the notification referred to in point (a) of this subparagraph; and
(c) become subject to the clearing obligation referred to in Article 4 for all OTC derivative contracts pertaining to any class of OTC derivatives which is subject to the clearing obligation entered into or novated more than four months following the notification referred to in point (a) of this subparagraph.

2. A financial counterparty that is subject to the clearing obligation referred to in Article 4 on 17 June 2019 or that becomes subject to the clearing obligation in accordance with the second subparagraph of paragraph 1, shall remain subject to that obligation and shall continue clearing until that financial counterparty demonstrates to the relevant competent authority that its aggregate month-end average position for the previous 12 months does not exceed the clearing threshold specified pursuant to point (b) of Article 10(4). The financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end average position for the previous 12 months does not lead to a systematic underestimation of that position.

3. In calculating the positions referred to in paragraph 1, the financial counterparty shall include all OTC derivative contracts entered into by that financial counterparty or entered into by other entities within the group to which that financial counterparty belongs. Notwithstanding the first subparagraph, for UCITS and AIFs, the positions referred to in paragraph 1 shall be calculated at the level of the fund. UCITS management companies which manage more than one UCITSs and AIFMs which manage more than one AIF shall be able to demonstrate to the relevant competent authority that the calculation of positions at the fund level does not lead to:
(a) a systematic underestimation of the positions of any of the funds they manage or the positions of the manager; and
(b) a circumvention of the clearing obligation.
The relevant competent authorities of the financial counterparty and of the other entities within the group shall establish cooperation procedures to ensure the effective calculation of the positions at the group level.

Article 10 of EMIR: Non-financial counterparties

1. Every 12 months, a non-financial counterparty taking positions in OTC derivative contracts may calculate its aggregate month-end average position for the previous 12 months in accordance with paragraph 3. Where a non-financial counterparty does not calculate its positions, or where the result of that calculation in respect of one or more classes of OTC derivatives exceeds the clearing thresholds specified pursuant to point (b) of the first subparagraph of paragraph 4, that non-financial counterparty shall:

(a) immediately notify ESMA and the relevant competent authority thereof, and, where relevant, indicate the period used for the calculation;

(b) establish clearing arrangements within four months of the notification referred to in point (a) of this subparagraph;
(c) become subject to the clearing obligation referred to in Article 4 for the OTC derivative contracts entered into or novated more than four months following the notification referred to in point (a) of this subparagraph that pertain to those asset classes in respect of which the result of the calculation exceeds the clearing thresholds or, where the non-financial counterparty has not calculated its position, that pertain to any class of OTC derivatives which is subject to the clearing obligation.

2. A non-financial counterparty that is subject to the clearing obligation referred to in Article 4 on 17 June 2019 or that becomes subject to the clearing obligation in accordance with the second subparagraph of paragraph 1 of this Article, shall remain subject to that obligation and shall continue clearing until that non-financial counterparty demonstrates to the relevant competent authority that its aggregate month-end average position for the previous 12 months does not exceed the clearing threshold specified pursuant to point (b) of paragraph 4 of this Article.

The non-financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end average position for the previous 12 months does not lead to a systematic underestimation of the position.

2a. The relevant competent authorities of the non-financial counterparty and of the other entities within the group shall establish cooperation procedures to ensure the effective calculation of the positions at the group level.

3. In calculating the positions referred to in paragraph 1, the non-financial counterparty shall include all the OTC derivative contracts entered into by the non-financial counterparty or by other non-financial entities within the group to which the non-financial counterparty belongs, which are not objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group.
[…]

45. As per the above Articles, there are differences in how FCs and NFCs calculate their positions. Notably, Articles 4a(3) and 10(3) establish that when calculating positions, on the one hand, FCs will take into account all those OTC derivatives entered into by any entity within their group and, on the other hand, NFCs will only take into account OTC derivatives entered into by any NFC within the same group.

46. In addition, NFCs benefit from the so-called hedging exemption whereby OTC derivatives that are entered into to reduce risks related to the commercial activity of the NFC are excluded from the calculation of positions for the purpose of the clearing obligation. The EMIR framework provides criteria to establish which OTC derivative contracts are to be considered as hedging transactions, which include the accounting

definition of hedging based on International Financial Reporting Standards (IFRS) rules, as well as proxy hedging and portfolio hedging.

47. Another element to consider is that NFCs, when exceeding a clearing threshold become subject to clearing only for the asset class/es in which their positions are above the threshold rather than for all asset classes. For instance, if an NFC exceeds the EUR 3 billion threshold for credit derivatives, it becomes subject to clearing credit derivatives but does not become subject to clearing IRDs (unless it also exceeds the clearing threshold for IRDs). In contrast, when an FC exceeds a single clearing threshold, it becomes subject to clearing all asset classes for which there is a mandate to clear.

48. Lastly, with regards to risk-mitigation techniques and the exchange of collateral, the delegated regulation on margining[12] provides for an exemption from initial margin when below the EUR 8 billion threshold set in this Delegated Regulation.

49. Beyond this exemption, NFCs, when exceeding a clearing threshold (NFC+), become subject to additional risk mitigation techniques[13] for non-cleared derivatives and they have to start exchanging collateral. In particular, they must post variation margin from the moment they become NFC+ and initial margin according to the phase-in established in the commission delegated regulation on margining[14] (depending on their aggregate average notional amount of non-centrally cleared derivatives as defined in the Delegated Regulation).

50. The following table illustrates the changes introduced in EMIR regarding the clearing obligation (CO) and the impact of the clearing thresholds (CT) on FCs and NFCs:

	EMIR		**EMIR Refit**	
	FCs	**NFCs**	**FCs**	**NFCs**
CTs	Not applicable	EUR 1 billion: credit and equity derivatives EUR 3 billion: IRDs, FX and commodity derivatives	***New:** Same CT as NFCs but some differences (e.g. no hedging exemption)	Same as before
Entities subject to CO	All FCs	NFCs above CT excluding hedging (NFCs+)	***New:** Only FCs above CT	Same as before

[12] Article 28 of the Commission Delegated Regulation 2016/2251.
[13] Article 11 of EMIR.
[14] Article 36 of the Commission Delegated Regulation 2016/2251.

Asset classes to clear	All asset classes for which there is a CO	For NFCs+, all asset classes for which there is a CO.	For FCs+, all asset classes for which there is a CO	***New:** For NFCs+, only asset classes for which the CT is exceeded and for which there is a CO.
Risk mitigation techniques excluding exchange of collateral	All FCs	All NFCs (RMTs for NFCs+)	Same as before	Same as before
Exchange of collateral	All FCs (initial margin when above the EUR 8 bn threshold)	NFCs+ (initial margin when above the EUR 8 bn threshold)	Same as before	Same as before

4.2 Counterparties subject to the clearing obligation: clarifications to ensure a consistent implementation

51. In order to ensure consistency in how counterparties determine whether they are above or below the clearing thresholds, ESMA has worked on a number of clarifications which have fed into ESMA's EMIR Q&A document. The Q&A document on the implementation of EMIR is available on ESMA's website[15].

52. Following the European Supervisory Authorities Review[16], some questions that contained an element of interpretation of Union Law were forwarded to the European Commission with the final objective to also include them in ESMA's Q&A document and hence provide one consolidated set of clarifications to stakeholders on these issues.

53. For instance, in relation to the hedging exemption, ESMA raised two questions to the Commission asking first, for clarification on whether NFCs whose activity is to deal in financial instruments can benefit from the hedging exemption. This would be the case for instance of special purpose vehicles (SPVs), which are generally considered NFCs under EMIR as amended by Refit.

54. Secondly, ESMA also raised a question to the European Commission aiming at gaining clarity on whether groups of entities with both FCs and NFCs could benefit from the hedging exemption for NFCs when calculating positions of FCs within the same group.

[15] https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52_qa_on_emir_implementation.pdf
[16] Regulation (Eu) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R2175&from=EN

In other words, the Commission was asked whether the hedge trades entered into by an NFC would count towards the clearing thresholds when calculating the positions of the FCs within the same group. These clarifications will be included in the ESMA EMIR Q&A in due time.

55. Going back to the various clarifications provided by ESMA in its EMIR Q&A document, this includes a Q&A on the process to calculate positions. According to OTC Question 3 under the EMIR Q&A, in order to determine whether a counterparty is above or below the clearing thresholds, the counterparty is required to perform the calculation of its aggregate month-end average position in OTC derivatives for the previous 12 months. To do this, a counterparty needs to:

- Determine its total position for each OTC derivative asset class on the last day of each of the previous 12 months. This should be done in accordance with the calculation rules in Article 4a(3) or Article 10(3) of EMIR respectively, depending on whether a counterparty is an FC or an NFC;
- Conduct the calculations referred to in (i) for each entity in their group. Following this, aggregate for each OTC derivative asset-class each month-end position for each group entity to find the aggregate figure for each asset class at group level. This should be done in accordance with the rules in Article 4a(3) or Article 10(3) of EMIR for FCs and NFCs respectively and which specify which entities and which OTC derivative contracts to include;
- Find the average of the total amount across the 12 months by dividing that number by 12 for each asset class[17]; and
- Compare the resulting number for each asset class with the relevant clearing threshold to determine whether the amount exceeds the relevant clearing threshold for any of the asset classes.

56. In addition, EMIR Q&A question OTC 3(f) indicates that,

"In order to determine whether it is above or below the clearing thresholds, the counterparty should first net their positions per counterparty, including where the counterparty is a CCP, and contracts and then add up the absolute notional value of all these net positions (calculated based on the notional amounts of the contracts). Netting per contracts and counterparty should be understood as fully or partially offsetting contracts having exactly the same characteristics (type, underlying, maturity, etc.) with the only exception being the direction of the trade and notional amount (in case of partial offset) concluded with the same counterparty." Other aspects to be noted relate to how to consider positions entered into by funds and third-country entities. Although the norm is that the calculation is done taking into account the positions of

[17] EMIR Q&A OTC 2(h) specifies that "Counterparties which start taking positions in OTC derivative contracts (because they are newly created entities or because they did not take positions in OTC derivative contracts before) and which choose to calculate their aggregate month-end average position for the previous 12 months, would need to determine the results of that calculation 12 months after they start taking positions in OTC derivative contracts. On that day, these counterparties who exceed the clearing thresholds or who choose not to calculate their positions will have to notify ESMA and the relevant NCAs immediately."

different entities in the group, there is an exception for funds, for which the calculation is done at fund level.

57. In addition, as clarified in the EMIR Q&A document, positions taken by third-country counterparties belonging to the same group as an EU FC or NFC, which would be considered FCs or NFCs if they were in the EU, count for the calculation of the clearing thresholds. The group to which the EU FC or NFC belongs includes subsidiaries, sister and parent companies wherever the ultimate parent company is established[18].

58. In light of this and under the EMIR regime as presented, where an FC or an NFC does not calculate its positions against the clearing thresholds, or when the result of the calculation exceeds the clearing thresholds, FCs and NFCs are required to immediately notify ESMA and the relevant competent authority. These counterparties will become subject to the clearing obligation (for the asset classes mandated to clear, i.e., credit and interest rate derivatives) for the OTC derivative contracts they enter into, or novate, and starting from four months following the notification. In addition, NFCs above the clearing threshold or those who chose not to calculate their positions will also become subject to collateral requirements (when they are above the 8 billion euros threshold according to delegated regulation on margining)[19].

59. Similarly, when an FC or an NFC no longer exceeds the clearing thresholds should also notify ESMA and the relevant national competent authority.

Question 1:

Please explain if you see a need for further clarification on how to identify OTC contracts for the purpose of the calculation of the positions to be compared to the clearing thresholds.

Question 2:

Please explain if you see a need for further clarification to identify OTC contracts that can be considered as reducing risks directly relating to commercial activity or treasury financing activity. And please mention any additional aspects to be further considered with regards to the hedging exemption.

[18] OTC Question 3(d)(3)-(4), EMIR Q&A: https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52_qa_on_emir_implementation.pdf
[19] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2251&from=EN

5 The impact of Brexit and the international perspective on the EMIR clearing regime

60. As previously mentioned in this paper, Brexit has had a number of consequences in financial markets and in OTC derivative markets. One of those is the change of status of regulated markets in the UK after the effective date of departure of the UK from the EU. As defined under EMIR, '*OTC derivative contracts*' are those the execution of which does not take place on a regulated market[20] or a third country market considered to be equivalent to a regulated market. For a third country market to be considered equivalent to a regulated market in the EU, the Commission should adopt an implementing decision declaring the equivalence[21]. Therefore, in absence of an equivalence decision under EMIR 2a for UK markets, the contracts concluded on those markets that were considered ETDs when executed before Brexit, are now considered OTC (when executed after Brexit) and therefore count towards the clearing thresholds.

61. The effect of the change of status of UK markets under EMIR materialises when combined with how EMIR determines which counterparties are above the clearing thresholds (and therefore become subject to the relevant regulatory requirements, in particular the clearing obligation and bilateral margining). As described in section 4, when determining who is above the clearing thresholds, EMIR considers OTC derivative positions at group level. For instance, OTC trades executed by a third-country entity belonging to a group where one or more group entities are located in the EU should be included in the calculation according to Articles 4a(3) and 10(3) of EMIR.

62. Consequently, on the one hand, the calculation of the clearing thresholds follows a methodology based on the volume of OTC derivative contracts at group level, and on the other hand, the definition of OTC derivative contracts in Article 2(7) of EMIR considers as OTC derivative contracts the derivatives executed on non-recognised third-country markets. In practice, this means that following Brexit, EU counterparties executing derivatives on UK markets will have to count them as OTC derivatives. This would be the case for instance of certain NFC energy companies that enter into commodity derivative trades (that do not qualify for the hedging exemption) executed on UK markets that qualified as regulated markets before Brexit but no longer do. These trades now contribute to their overall OTC position towards the clearing thresholds.

[20] 'regulated market' means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of this Directive. Definition under Article 4(21) of MIFID II.

[21] Under Article 2a of EMIR, the European Commission may adopt an implementing act to determine the equivalence of a third country market to a EU regulated market for the purpose of EMIR. The list of third countries considered equivalent is available on ESMA's website: https://www.esma.europa.eu/sites/default/files/library/equivalent_tc-markets_under_emir.pdf

63. This could potentially put these NFCs at risk of exceeding the clearing thresholds and thus incur additional requirements and costs. These additional costs are mainly related to margining requirements for bilateral OTC transactions, as most of the derivatives these entities trade are either already cleared (commodity derivatives these NFCs execute on UK markets are cleared) or not subject to the clearing obligation (the clearing obligation for NFCs applies only in the asset classes in which they breach the respective thresholds). In other words, from a risk management or margins perspective, nothing has changed for the contracts that were previously ETD and are now OTC. Those contracts were cleared by a CCP and continue to be cleared by a CCP, but for the NFCs that would become NFCs+ then bilateral margining could start applying if they breach the minimum threshold applicable for margin requirements and this would have a consequence on all the contracts that are not centrally cleared at a CCP.

64. In fact, some energy companies have voiced these concerns, initially regarding the impact of a lack of equivalence for UK markets and the consequences of new derivative contracts counting as OTC after Brexit. However, for completeness, it should also be mentioned that these energy companies have also argued that there is a broader range of issues with the clearing threshold framework. They are suggesting in particular that the current level of the clearing thresholds for commodity derivatives and the methodology to calculate positions (including what can qualify as hedging) can limit their ability to enter into the derivative transactions they would need to do in the context of activities contributing to the energy transition.

65. ESMA has published a Q&A clarifying that the trades executed on UK markets up until the last day of the transition would remain ETDs afterwards, i.e., that only position resulting from new trades would be OTC and would start counting towards the clearing thresholds. This Q&A[22] and the way the calculation is defined in EMIR (based on a 12-month period) offered a number of mitigants against a cliff-edge effect. However, in the prolonged absence of an equivalence decision, a more structural and longer-term problem arises as many EU NFCs appear to rely on UK commodity derivative markets and cannot always qualify their trades as hedging. That could have an undesired effect on some EU NFCs, who might limit their UK non-commercial hedging activity in those previously considered ETDs, to stay under the clearing threshold for the next calculation cycle (June 2022). It would thus be interesting to receive input on whether there are alternatives to these derivatives for the purpose they are entered into.

66. The core of the review covered in this document is centred more on the overall appropriateness of the thresholds rather than on the impact of Brexit. Furthermore, the data used is from 2020 and therefore does not yet capture the impact of Brexit. However, although this report is primarily looking at the overall effectiveness and proportionality of the clearing thresholds, it is also an opportunity for market participants to voice any related views or concerns they may have on the clearing thresholds. This should be looked into from the broader perspective, i.e., considering the EMIR

[22] EMIR Q&A OTC 20(a).

framework as a whole (calculation methodology, hedging regime, etc.) and not just the level of the current clearing thresholds. With this broader approach in mind, stakeholders are thus invited to provide input with regards to the Brexit consequences for NFCs on their derivative activity and needs.

67. EMIR prescribes the way in which the calculation of positions in OTC derivatives should be carried out for the purpose of determining which counterparties are subject to the clearing obligation. At the same time there are some fungible financial instruments that can be traded on regulated markets as well as off-venue. This would be the case, for instance, of futures traded in a regulated market and of futures of the same kind traded OTC or in a third-country market that is not recognised by the Commission as equivalent to a regulated market in the EU. There as well, stakeholders are invited to provide feedback on how they are approaching this aspect in their calculations and whether certain clarifications would be needed.

68. The EMIR framework in relation to the clearing thresholds and the obligations triggered when counterparties exceed them has been progressively adjusted. One of the objectives behind the recent EMIR Refit changes was to introduce more proportionality. The goal was to continue mitigating systemic risk while achieving a more balanced compliance cost for some counterparties, especially for counterparties trading lower volumes of OTC derivative contracts (i.e., FCs- and NFCs-). ESMA is aware that there are different regulatory approaches at international level and is thus inviting stakeholders to provide feedback on how they see the EU regime working, considering other jurisdictions with similar regulatory requirements.

69. Lastly, ESMA is also mindful that there should be some level of stability in the regulation, once implemented, given the compliance costs to adapt to changes. Therefore, any change should be carefully considered in view of the original objective of the thresholds. Respondents are invited to also take this aspect into account.

Question 3:

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

Question 4:

Please provide data and arguments to illustrate the potential impact of the lack of an equivalence decision under Article 2a of EMIR and what could be done to alleviate your concerns (besides an equivalence decision)? Please specify the kind of transactions and activities that would be affected and the purpose of those, and whether there are alternatives.

Question 5:

Please describe the scenarios when transactions do not qualify as hedging transactions.

Question 6:

Please describe your views on how the EMIR framework works (also compared to other regimes) for the purpose of the clearing thresholds and the requirements triggered by those? Please provide examples and supporting data.

6 Market overview

70. Central clearing has steadily increased in the past years and has become a well-established practice among market participants. The 2020 ESMA EU Derivatives Markets report[23] (ASRD) illustrates this tendency for the asset classes that are subject to mandatory clearing. However, for the asset classes for which there is no mandate to clear, numbers continue to be low, with 1% for equity, 2% for currency and 10% for commodities. Here is an extract of the 2020 ASRD report (based on 2019 data):

"[…] there has been a strong growth in central clearing rates for both IRDs and credit derivatives, from 63% to 69% for IRDs[24]; and from 25% to 32% for credit derivatives. Underlying this, was growth in the clearing rates for the specific products subject to the clearing obligation".

71. This trend is illustrated in Figures 1 and 2 below.

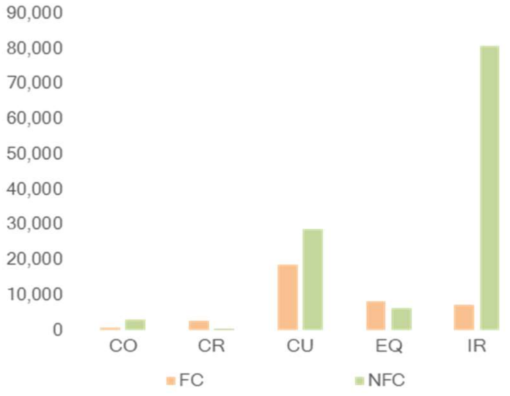
Figure 1: Increasing trend in clearing rates during 2019 for IRDs and credit derivatives

Figure 2: Cleared notional vs increase of clearing rates.

72. Another aspect to take into account is the split between the different derivatives traded by asset classes (commodity derivatives, credit derivatives, FX derivatives, equity derivatives and IRDs) and the split between the different type of counterparties active in OTC derivative markets (FCs and NFCs). Figure 3 illustrates the asset classes traded by type of counterparties, and Figure 4 shows the number of asset classes in which counterparties are trading.

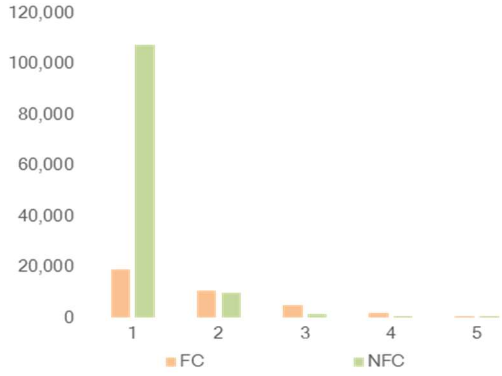
[23] The graphs in this section are from the ASRD. The ASRD can be found here: https://www.esma.europa.eu/sites/default/files/library/esma50-165-1362_asr_derivatives_2020.pdf
[24] IRDs refer to Interest Rate Derivatives.

Figure 3: Number of FCs and NFCs active in each derivative market



Sources: TR data, ESMA

Figure 4: Number of FCs and NFCs active in one or more asset classes



Sources: TR data, ESMA

73. When looking at the number of entities and the split by asset classes traded, we identify that there are more FCs active in currencies and equity than in other asset classes, and that the number of NFCs active in IRDs and currencies is higher than in other asset classes. In addition, we see that the majority of NFCs trade mainly in one asset class; and the same happens for FCs although in lower proportions.

7 Information gathered from notifications on the clearing obligation submitted to ESMA by counterparties

74. Since the entry into force of EMIR Refit all counterparties need to notify ESMA and their relevant NCA when they are subject to the clearing obligation. For more detailed information on how to determine if a counterparty is subject to clearing, see section 3 and 3.1. of this report on Counterparties subject to the clearing obligation: Calculation of positions in OTC derivative contracts.

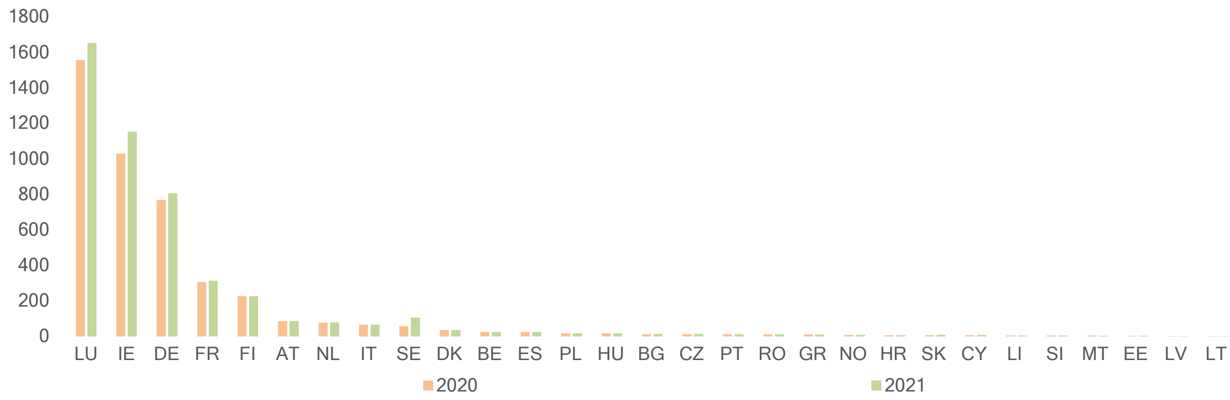
75. ESMA analysed the information gathered from the notifications submitted by entities that either decided not to calculate their positions against the clearing thresholds or entities that perform the calculation and as a result identify they are above the clearing thresholds[25]. ESMA has provided market participants with a template[26] and built a database that is automatically generated from the notifications considered compliant with the established parameters in the template. The majority of counterparties' notifications were received at the time of entry into force of EMIR Refit, i.e., at the time of the first calculation in June 2019. Since then, counterparties need to re-run their calculations every 12 months and only notify when their status has changed (i.e., when

[25] As explained in section 3, in both cases counterparties become subject to the clearing obligation.
[26] The template for market participants to notify ESMA on whether they are subject or no longer subject to clearing can be found on ESMA's website: https://www.esma.europa.eu/files/refitnotification-clearingthreshold-fcsnfcsxlsx

they start to exceed or when they no longer exceed one or more clearing thresholds). However, counterparties do not need to notify ESMA or the NCAs when their status did not change from one year to the next.

76. The statistics used in this report take into consideration the last record provided by counterparties in their notifications submitted to ESMA, considering the information received from June 2019 (when Refit entered into force), notifications received in 2020 and up to July 2021. The numbers presented include entities that are part of a group as well as stand-alone entities. In addition, the bars in Figure 5 present the number of entities subject to the clearing obligation up to 2020, and also the updated figures for 2021. This treatment of the data on the notifications received allows to see that the number of entities subject to clearing increased in the last period.

Figure 5: Counterparties subject to clearing by country in the EEA (progression 2020-2021).



77. This chart presents the progression in the number of counterparties that notified ESMA and that are to be considered above the clearing threshold and consequently, subject to clearing for the asset classes for which there is a clearing mandate in place. The count of counterparties includes those who notified ESMA that they are above the clearing thresholds for any asset class and those counterparties which chose not to calculate their positions.

78. Using the data submitted to ESMA we can identify the number of counterparties potentially subject to the clearing obligation and the countries where they are located. We see that the countries with more entities above the clearing threshold are Luxembourg[27], Ireland and Germany. The number of entities is also significant although

[27] It should be mentioned that in Luxembourg a lot of entities are funds which trade only in currency and ETDs. In addition, lots of funds choose not to calculate the exposure, which means that they have to be considered FC+. However, these funds will only subject to clearing if trading with IRDs and credit derivatives.
This situation is similar also in Ireland, where a significant number of funds has notified without calculating their positions.

lower in France and in Finland, while in the rest of countries levels are below 200 entities.

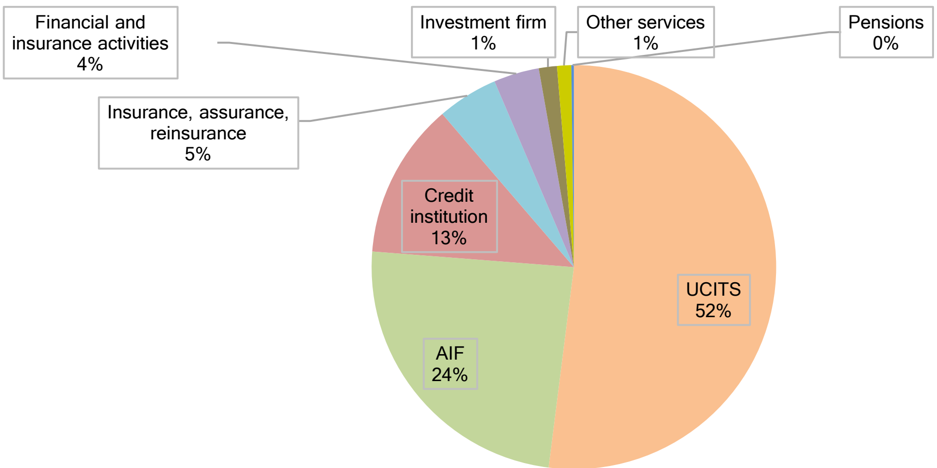
79. According to the notifications ESMA received in 2020, there was a total of 4,359 entities subject to the clearing obligation. In 2021, numbers increase slightly, with a total of 4,680 entities subject to clearing. Figures from 2021 are cumulative and show all the counterparties currently subject to clearing. As it is shown, the total population of counterparties subject to clearing has increased in the last period notified.

80. To complement this information, Figures 6 and 7 below present the type of counterparties subject to the clearing obligation and their sector of activity. As it is shown, there is a clear majority of FCs with respect to NFCs. Another aspect shown is that the majority of NFCs subject to clearing are dedicated to financial and insurance activities (although not qualifying as FCs).

Figure 6: Population of entities subject to the clearing obligation by type and sector (cumulative data from notifications received in 2019, 2020 and 2021).

Sector	Sector detail	2021
FC	UCITS	2398
FC	AIF	1117
FC	Credit institution	588
FC	Insurance, assurance, reinsurance	234
NFC	Financial and insurance activities	170
FC	Investment firm	67
NFC	Other services	55
FC	Pensions	10

Figure 7: Population subject to the clearing obligation by type of entity (cumulative data from notifications received in 2019, 2020 and 2021).



81. The pie chart shows that about the half of the entities subject to the clearing obligation are UCITS and about a quarter of the total are AIFs. Credit institutions (13%) and insurance, assurance and reinsurance (5%) are the sectors of activity that follow. The rest of entities such as NFCs dealing with financial and insurance activities, investment firms and other types of counterparties amount to less than 10% of the total.

8 Overview of the clearing thresholds by asset classes

82. This section presents statistics to illustrate the impact of applying the current clearing thresholds to the different derivative asset classes, i.e., commodities, credit, currencies, equity and interest rates. The statistics in this section are based on notional reported by EEA counterparties to TRs in December 2020.

83. The section is divided in sub-sections, each dedicated to the different derivatives asset classes (credit derivatives, IRDs, commodity, equity and currency derivatives). In addition, for the asset classes for which there are certain instruments subject to mandatory clearing (i.e., credit derivatives and IRDs) we present statistics on only these instruments mandated to clear, to show the population that is currently clearing.

84. Likewise, we also present statistics that take into consideration all credit derivatives and all IRDs (not only the instruments for which there is a clearing mandate today) to provide a broader view on the number of entities and groups that are above the clearing threshold. These statistics considering all credit derivatives and IRDs allow us to see the population subject to clearing, even if they do not clear today because they do not enter into contracts that are mandated to be cleared.

85. We have taken a top-down approach to investigate how do the current clearing thresholds apply by asset class. Therefore, we present a set of eight pie charts by asset class, presenting four different perspectives going from the groups structure to the different type of entities. In addition, for each of these perspectives adopted, we present two charts; one looks at the number of groups/entities active in each asset class that are above the relevant clearing threshold, and the second chart looks at the percentage of notional traded that is captured by the threshold.

86. **The group perspective** provides information on the group structures and how the clearing obligation impacts them. We note that the calculation of positions in OTC derivatives under EMIR is performed at group level. All the groups with at least on EEA subsidiary or EEA parent entity have been considered in the statistics shown.

87. **The counterparties' perspective** provides information on the number of entities that are above the clearing threshold (FCs and NFCs) by asset class and also information on the percentage of notional traded by counterparties that is captured by the clearing thresholds. Though all the positions available have been used to compute the group

position and the 12 months average position, only EEA entities are presented in the final statistics.

88. **The FCs perspective** provides information on the number of FCs trading in each asset class and also on the percentage of notional traded by asset class captured by the current clearing thresholds. The statistics on FCs only show entities in the EEA.

89. **The NFCs perspective** provides information on the number of NFCs trading in each asset class and also on the percentage of notional traded by asset class that is captured by the current clearing thresholds. As a clarification, please note that the analysis is undertaken by asset class independently. The statistics on NFCs only show entities in the EEA.

8.1 Clearing thresholds applied to credit derivatives

90. Currently credit derivatives mandated to be cleared are those included in the Commission Delegated Regulation (EU) 2016/592[28]. The clearing obligation applies to the following classes of credit derivatives;

91. European untranched Index Credit Default Swap (CDS) classes:

Id	Type	Sub-type	Geographical zone	Reference index	Settlement currency	Series	Tenor
B1.1	Index CDS	Untranched Index	Europe	iTraxx Europe Main	EUR	17 onwards	5Y
B.1.2	Index CDS	Untranched Index	Europe	iTraxx Europe Crossover	EUR	17 onwards	5Y

92. This section presents separately, first, statistics on credit derivatives that are currently subject to the clearing obligation and, second, statistics on all credit derivatives regardless of whether they are currently subject to the clearing obligation.

93. The reason to include in this paper information related to credit derivatives that are not currently subject to the clearing obligation is twofold, on the one hand it provides information on the potential impact of the clearing thresholds in case the clearing obligation is extended in the future; and, on the other hand, this information is also relevant as those credit derivatives do count in the calculation of positions of OTC derivatives for determining which counterparties become subject to the clearing obligation. Additionally, there are other aspects to consider that relate to the fact that a counterparty's positions are above the clearing threshold; for instance, when an NFC

[28] EUR-Lex - 32016R0592 - EN - EUR-Lex (europa.eu)

exceeds the clearing thresholds, becomes subject to the exchange of collateral obligation (Art. 11 of EMIR)[29].

8.1.1 Clearing thresholds (CT) applied to credit derivatives under the clearing obligation (CO)

94. This sub-section looks into credit derivatives for which there is the mandate to clear under EMIR. It presents the population of groups and counterparties trading in credit derivatives and the percentage of notional traded in CDSs that are above the clearing threshold and thus subject to the clearing obligation. As a reminder, the clearing threshold is set at 1 billion euros for credit derivatives.

95. Groups perspective:

Figure 8: Groups above the CT.

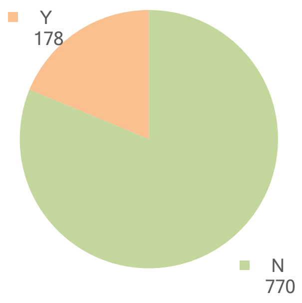
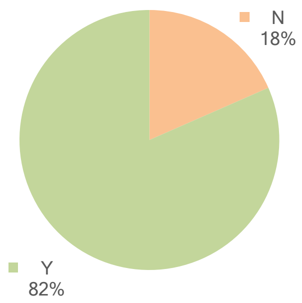


Figure 9: Notional traded by groups captured by the CO.



96. This graph refers to groups trading credit derivatives that are subject to mandatory clearing (and includes both FCs and NFCs). We observe that in relation to CDSs subject to mandatory clearing, the current threshold for credit derivatives captures 95% of the total notional traded by EEA groups. There are 169 groups subject to the clearing obligation, which represents 19% of the groups trading in this market.

97. Counterparties perspective:

98. The following graphs present a different perspective and look into the number of counterparties (rather than to group structures) that have trading activity in CDSs subject to mandatory clearing. This chart includes all counterparties (FCs and NFCs) and we observe that 30% of the counterparties (178) are subject to the clearing obligation. In addition, we also see that in terms of notional, 95% of the total traded in credit derivatives mandated to clear is captured by the current threshold.

[29] ESMA has also clarified the obligations to which an NFC- is subject in an EMIR Q&A. See OTC Q&A 12: https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52_qa_on_emir_implementation.pdf

Figure 10: Counterparties above the CT.

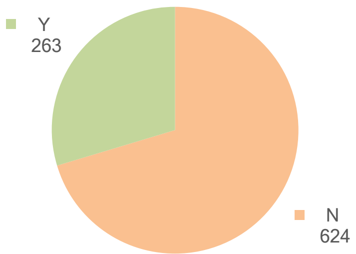
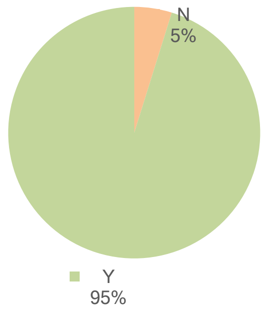


Figure 11: Notional captured by the CO.



99. The charts below present the split of trading in credit derivatives between FCs and NFCS.

100. FCs' perspective:

Figure 12: FCs above the CT.

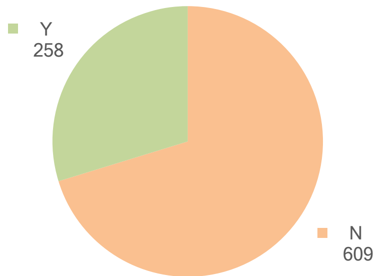
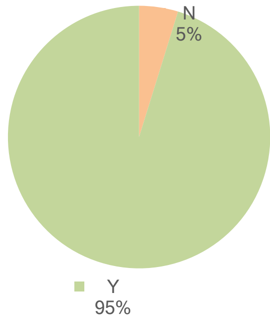


Figure 13: Notional captured by CO.



101. NFCs' perspective

Figure 14: NFCs above the CT.

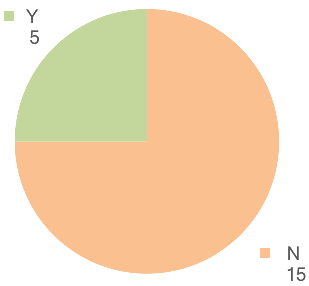
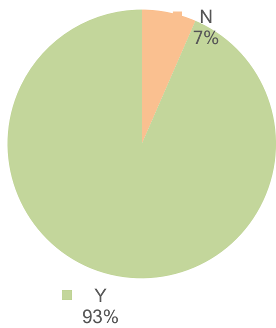


Figure 15: Notional captured by the CO.



102. It is noted that regarding credit derivatives for which there is currently a mandate to clear, there are 258 FCs above the clearing threshold, which represents 30% of the FCs population trading credit derivatives. In addition, we see that the clearing obligation

captures 95% of the notional traded in credit derivatives for which there is a mandate to clear.

103. Regarding NFCs, we observe that 25% (in fact only 5 NFCs) of the NFCs trading in credit derivatives (out of a total of 15) that are currently subject to the clearing obligation are above the clearing threshold. The population above the clearing threshold represents 93% of the notional traded in the type of credit derivatives under the clearing obligation.

104. *Considerations*: Analysing these results, we observe that the current clearing thresholds do have a large coverage for credit derivatives under the clearing obligation because in both cases, FCs and NFCs, the threshold captures more than 90% of the notional traded. In terms of population, the current threshold for credit derivatives seems to be proportionate as it captures 30% or less for both FCs and of NFCs (25%) that are active in this asset class. In addition, it is noted that the absolute number of NFCs trading with credit derivatives is small compared to other asset classes. Having said that, and this is also relevant for the rest of the document, this analysis is only based on notional and number of counterparties. There are obviously other risk factors that would give a more refined description of the risk impact of these transactions, but that were not deemed necessary for the purpose of this exercise.

8.1.2 Clearing thresholds applied to credit derivatives including classes not subject to the clearing obligation

105. This sub-section looks into all credit derivatives traded, including all classes and not only those CDSs under the clearing obligation. It is noted that all trades on credit derivatives count for the purpose of the counterparties' calculation of positions against the clearing threshold.

106. Group perspective:

Figure 16: Groups above the CT.

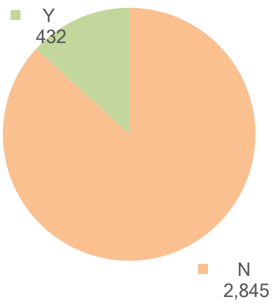
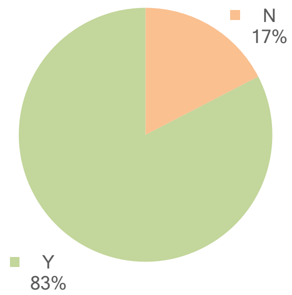


Figure 17: Notional captured by the CT.



107. We observe that 13% of the groups trading credit derivatives are above the clearing thresholds, which means that 83% of the total notional traded in this asset class is captured by the threshold.

108. Counterparties' perspective:

Figure 18: Counterparties above the CT.

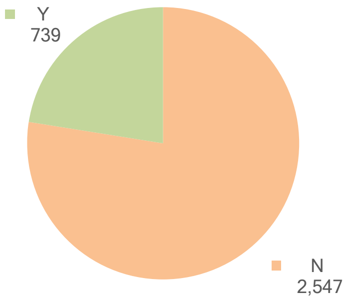
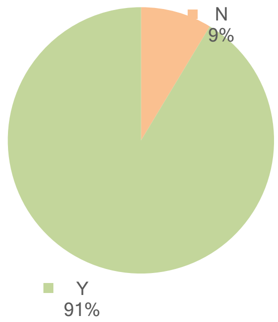


Figure 19: Notional captured by the CT.



109. The figures above illustrate the number of counterparties above the clearing threshold for credit derivatives (considering all credit derivatives traded). We observe that 739 counterparties are above the clearing threshold, which corresponds to 22% of the population of counterparties trading credit derivatives. These counterparties represent 91% of the total notional traded in credit derivatives. These figures include trades entered into by both FC and NFCs.

110. Overall, these figures show a large coverage in terms of the notional and market share captured by the current clearing thresholds.

111. In a closer look we can see the split between FCs and NFCs that are above the clearing threshold for credit derivatives. We observe there are significant differences in how the current clearing threshold impacts FCs and NFCs. However, in terms of systemic risk it is also noted that NFCs, although having a lower coverage, represent also lower trading volumes.

112. FCs' perspective:

Figure 20: FCs above the CT.

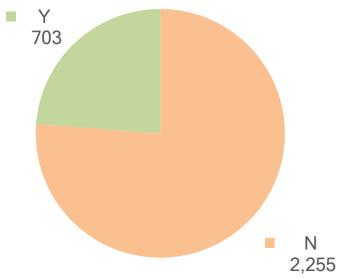
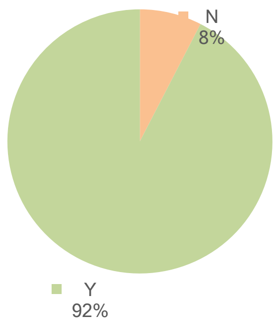


Figure 21: Notional captured by the CT.



113. NFCs' perspective:

Figure 22: NFCs above the CT.

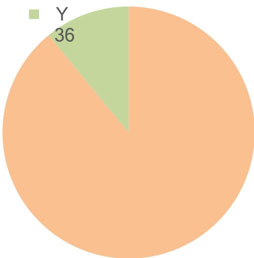


Figure 23: Notional captured by the CT.

114. It is noted that the percentage of notional in credit derivatives that would be captured by the current clearing threshold is very effective when applied to FCs. Indeed, with 703 FCs, which represent 24% of the population of FCs trading in credit derivatives, a total of 92% of the total notional traded would be above the clearing threshold.

115. However, only 36 NFCs, 11% of the population of NFCs trading with credit derivatives are above the clearing threshold. This population represents 57% of the total notional traded by NFCs in all credit derivatives.

116. *Considerations*: This analysis reflects the different nature of FCs and NFCs with respect to the trading of credit derivatives, broadly speaking, it indicates that this asset class is more relevant for FCs. It is also noted that only 11% of the NFCs trading credit derivatives (a small number in absolute terms given the low number of NFCs active in credit derivatives) are above the threshold, and that among those, only the ones trading CDSs for which there is a mandate to clear will have to clear.

Question 7:

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.

8.2 Clearing thresholds applied to IRDs

117. The IRDs mandated to be cleared are specified in two Commission Delegated Regulations. The Commission Delegated Regulation (EU) 2015/2205 [30] and the

[30] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2205.

Commission Delegated Regulation (EU) 2016/1178[31], which include the following classes respectively:

118. Basis swaps classes denominated in EUR, GBP, JPY and USD:

Id	Type	Reference Index	Settlement currency	Maturity	Settlement Currency Type	Optionality	Notional Type
A.1.1	Basis	Euribor	EUR	28D-50Y	Single currency	No	Constant or variable
A.1.2	Basis	LIBOR	GBP	28D-50Y	Single currency	No	Constant or variable
A.1.3	Basis	LIBOR	JPY	28D-30Y	Single currency	No	Constant or variable
A.1.4	Basis	LIBOR	USD	28D-30Y	Single currency	No	Constant or variable

119. Fixed-to-float IRDs classes denominated in EUR, GBP, JPY, USD:

Id	Type	Reference Index	Settlement currency	Maturity	Settlement Currency Type	Optionality	Notional Type
A.2.1	Fixed-to-float	Euribor	EUR	28D-50Y	Single currency	No	Constant or variable
A.2.2	Fixed-to-float	LIBOR	GBP	28D-50Y	Single currency	No	Constant or variable
A.2.3	Fixed-to-float	LIBOR	JPY	28D-30Y	Single currency	No	Constant or variable
A.2.4	Fixed-to-float	LIBOR	USD	28D-30Y	Single currency	No	Constant or variable

120. Forward rate agreement classes denominated in EUR, GBP, JPY, USD:

Id	Type	Reference Index	Settlement currency	Maturity	Settlement Currency Type	Optionality	Notional Type
A.3.1	FRA	Euribor	EUR	3D-3Y	Single currency	No	Constant or variable
A.3.2	FRA	LIBOR	GBP	3D-3Y	Single currency	No	Constant or variable
A.3.3	FRA	LIBOR	JPY	3D-3Y	Single currency	No	Constant or variable

[31] 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 (europa.eu)

121. Overnight index swaps classes denominated in EUR, GBP, JPY, USD:

Id	Type	Reference Index	Settlement currency	Maturity	Settlement Currency Type	Optionality	Notional Type
A.4.1	OIS	EONIA	EUR	7D-3Y	Single currency	No	Constant or variable
A.4.2	OIS	FedFunds	USD	7D-3Y	Single currency	No	Constant or variable
A.4.3	OIS	SONIA	GBP	7D-3Y	Single currency	No	Constant or variable

122. Fixed-to-float IRDs classes denominated in NOK, PLN and SEK:

Id	Type	Reference Index	Settlement currency	Maturity	Settlement Currency Type	Optionality	Notional Type
C.1.1	Fixed-to-float	NIBOR	NOK	28D-10Y	Single currency	No	Constant or variable
C.1.2	Fixed-to-float	WIBOR	PLN	28D-10Y	Single currency	No	Constant or variable
C.1.3	Fixed-to-float	STIBOR	SEK	28D-15Y	Single currency	No	Constant or variable

123. Forward rate agreement classes denominated in NOK, PLN and SEK:

Id	Type	Reference Index	Settlement currency	Maturity	Settlement Currency Type	Optionality	Notional Type
C.2.1	FRA	NIBOR	NOK	3D-3Y	Single currency	No	Constant or variable
C.2.2	FRA	WIBOR	PLN	3D-3Y	Single currency	No	Constant or variable
C.3.3	FRA	STIBOR	SEK	3D-3Y	Single currency	No	Constant or variable

124. In addition, for completeness it should be noted that following the Benchmark transition away from EONIA and LIBOR, ESMA has been working on the revision[32] of the scope of the clearing obligation for IRDs denominated in EUR, GBP, JPY and USD, but that has not impacted this current analysis of the clearing thresholds.

125. Like with credit derivatives in the previous sub-section, this section presents separately, first, statistics on IRDs that are currently subject to the clearing obligation and, second, statistics on all IRDs regardless of whether they are currently subject to mandatory clearing.

[32] https://www.esma.europa.eu/sites/default/files/library/consultation_paper_on_the_co_and_dto_for_swaps_referencing_rfrs.pdf

8.2.1 IRDs under the clearing obligation (CO)

126. This section looks into IRDs for which there is the mandate to clear under EMIR. This exercise focuses on illustrating the population of counterparties and the percentage of notional traded in IRDs and on the impact of the current clearing threshold. The charts below account for IRDs traded in G4 currencies (EUR, USD, GBP, JPY) and in NOK, PLK and SEK. As a reminder, the clearing threshold for IRDs is set on 3 billion euros.

127. Group perspective:

Figure 24: Groups above the CT.

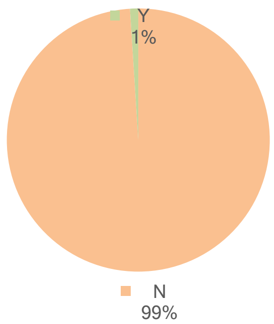
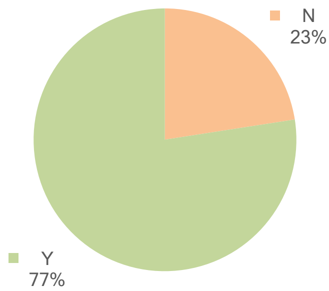


Figure 25: Notional captured by the CO.



128. We observe that a vast majority of groups are not captured by the clearing threshold without impacting on the overall systemic risk resulting from uncleared transactions (given the limited notional of these uncleared transactions). As shown in the charts above, the current threshold captures 826 groups trading IRDs for which there is the obligation to clear, which represents only 1% of the groups trading IRDs, and the result of applying the current threshold is that 77% of the notional traded is under the clearing obligation. Overall, numbers show that the current clearing threshold has a large coverage for IRDs.

129. Counterparties' perspective:

Figure 26: Counterparties above the CT.

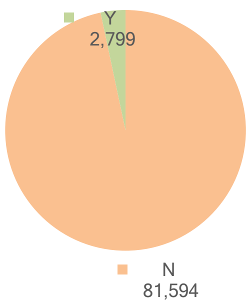
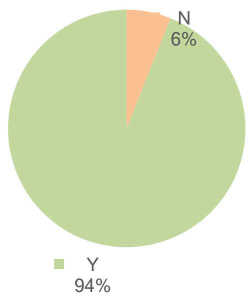


Figure 27: Notional captured by the CO.



130. When looking at the counterparties in the EEA (which includes FCs and NFCs) trading IRDs under the clearing obligation, we observe that 3% of the counterparties are above

the clearing threshold and in terms of notional, this represents 94% of the notional traded in this market being captured by the clearing threshold.

131. FCs' perspective:

Figure 28: FCs above the CT.

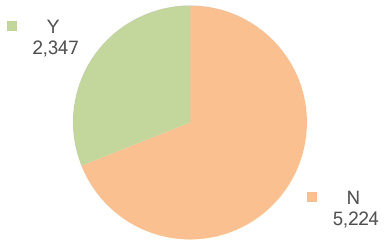
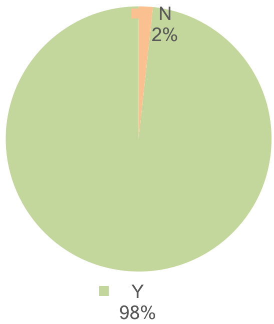


Figure 29: Notional captured by the CO.



132. NFCs' perspective:

Figure 30: NFCs above the CT.

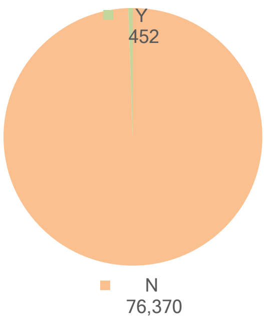
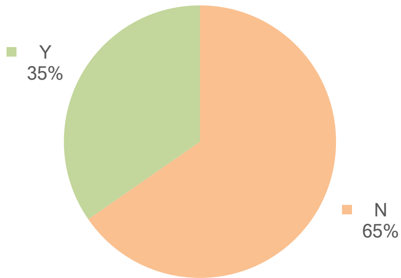


Figure 31: Notional captured by the CO.



133. The current threshold for IRDs captures 2,347 FCs, which represent 31% of the FCs trading in IRDs under the clearing obligation. In addition, this population represents 98% of the notional traded by FCs. This shows a very large coverage for IRDs with regards to FCs.

134. In comparison, the clearing threshold shows a different level of coverage when applied to trading in IRDs by NFCs. The current threshold captures 452 NFCs, 1% of the NFCs population active in this market. In terms of notional, 35% of the notional traded by NFCs active in IRDs is captured by the clearing threshold.

135. *Considerations:* This analysis illustrates the different nature and needs of FCs and NFCs trading with IRDs. This aspect, which is applicable throughout the document, was initially highlighted in the recitals of EMIR specifically when considering the need for a hedging exemption due to the different needs and trading strategy of NFCs[33]. The

[33] See EMIR recitals (29)-(31).

percentage of FCs clearing IRDs that are caught is 31%, while the notional captured is 98%. Regarding NFCs, the population of NFCs active in IRDs that is subject to clearing is very low, 1%, and the notional captured is 35%. This indicates that the NFCs captured by the clearing thresholds must be trading in big volumes and this should be read as a positive sign.

8.2.2 Overview of interest rate derivatives including classes not subject to the clearing obligation

136. This section looks into all IRDs traded, including those classes for which there is no current clearing mandate under EMIR. This exercise focuses on presenting the population of counterparties and the percentage of notional traded in IRDs above and below the clearing threshold.

137. Group perspective:

Figure 32: Groups above the CT.

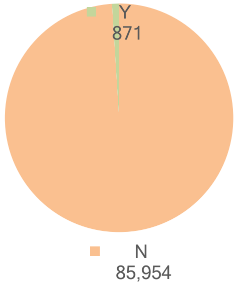
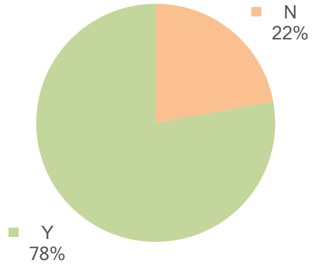


Figure 33: Notional captured by the CT.



138. We observe that 871 groups active in IRDs are above the clearing thresholds, which represents 1% of the groups active in this market. In addition, we can also see that 78% of the notional traded by groups is captured by the clearing threshold.

139. Counterparties' perspective:

Figure 34: Counterparties above the CT.

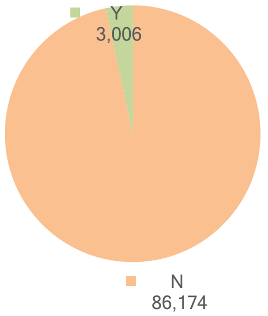
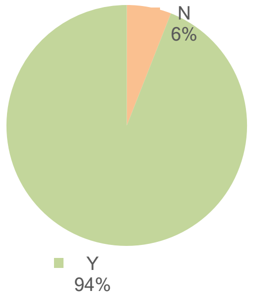


Figure 35: Notional captured by the CT.



140. We observe that 3,006 counterparties are above the clearing threshold. This population represents 3% of the counterparties active in IRDs and 94% of the total notional traded

in IRDs. These numbers indicate a large coverage capturing most of the notional traded while impacting a relatively low number of counterparties.

141. When looking into the split between FCs and NFCs, we appreciate substantial differences in how these clearing thresholds impact each category of counterparties. See figures below.

142. FCs' perspective:

Figure 36: FCs above the CT.

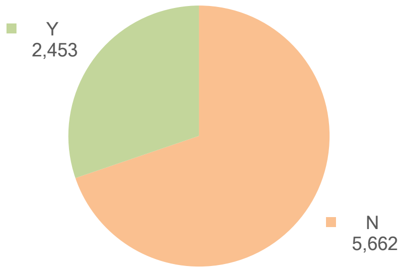
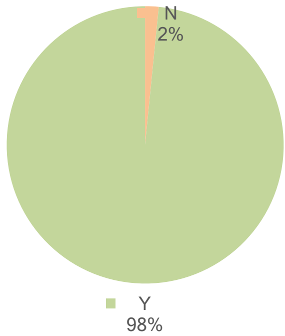


Figure 37: Notional captured by CT.



143. NFCs' perspective:

Figure 38: NFCs above the CT.

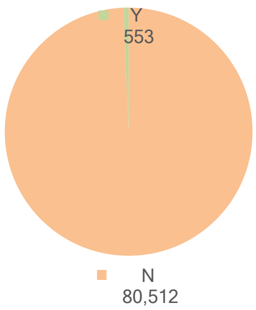
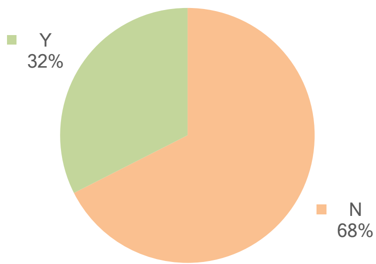


Figure 39: Notional captured by the CT.



144. The figures above illustrate that there are differences in how the current clearing thresholds for IRDs apply and impact FCs and NFCs. In the case of FCs, 30% of the entities would be subject to the clearing obligation and this represents 98% of the notional traded in IRDs. These proportions indicate a very large coverage for FCs by capturing a relatively low number of counterparties (major market participants) and close to the highest notional possible.

145. The picture regarding the thresholds coverage for NFCs appears to be lower than for FCs. We observe that the current clearing thresholds bring under the clearing mandate 553 NFCs, which correspond to 1% of the population. This represents 32% of the total notional of IRDs traded by NFCs, is above the clearing threshold. This indicates that the NFCs captured by the clearing thresholds trade in big volumes, which is a positive sign. This information should be contrasted with statistics presented in Section 10 on

Simulations to see if there are other big NFCs not included under the current threshold for IRDs that would be captured by slightly modifying the current clearing threshold.

146. *Considerations*: The figures show a clear difference between FCs and NFCs in the percentage of notional traded in IRDs that is captured by the clearing threshold. It is noted that NFCs are more active in this market than in the credit derivatives, as should be expected. Also, it is acknowledged that NFCs, as a category are less systemically important than FCs (although some NFCs are, and some FCs are not). The current threshold captures 30% of the FCs and 1% of the NFCs active in the IRD market. In terms of notional traded, in the case of FCs the threshold shows a very large coverage with 98% of the notional traded by FCs captured. In the case of NFCs, the clearing threshold captures above 30% of the notional traded by NFCs. This difference indicates the different nature and needs of FCs and NFCs and reflects that the NFCs trading in bigger volumes are already captured by the threshold.

Question 8:

Considering the current coverage provided by the clearing thresholds in relation to interest rate 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.

8.3 Other asset classes

8.3.1 Commodity derivatives

147. For the purpose of determining whether a counterparty is subject to clearing (in the case of FCs) in the asset classes for which there is a mandate to clear, or to determine if other requirements start to apply (such as risk mitigation techniques for NFCs), counterparties need to calculate their positions in all OTC derivatives against the clearing threshold (including commodity derivatives and other asset classes not mandated to clearing)[34].

148. The following charts present the population of groups and counterparties trading commodity derivatives. The charts identify the number of entities that are above and below the clearing threshold and show the percentage of notional traded in commodity derivatives captured by the clearing threshold (set at EUR 3 billion for commodity derivatives).

[34] See section 3.1 in this paper for detailed information on the calculation of positions in OTC derivatives.

149. Groups' perspective:

Figure 40: Groups above the CT.

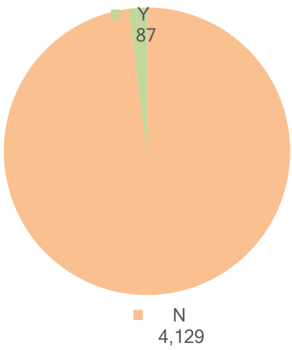
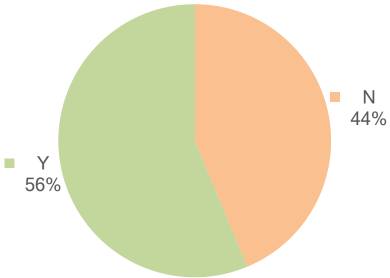


Figure 41: Notional captured by the CT.



150. We observe there are 87 groups, which represents 2% of groups that active in commodity derivatives, above the clearing thresholds in the EEA. In terms of notional, 56% of the total notional traded in this market is captured by the clearing threshold.

151. Counterparties perspective:

Figure 42: Counterparties above the CT.

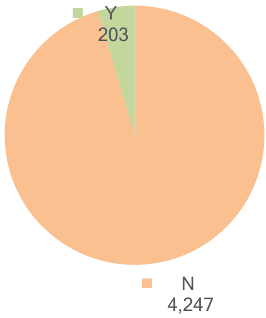
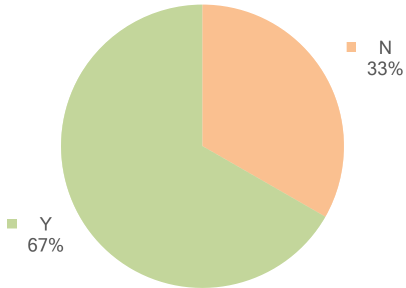


Figure 43: Notional captured by the CT.



152. The current clearing threshold captures 203 counterparties (5% of the counterparties trading with commodity derivatives and 67% of the notional traded in commodity derivatives.

153. The charts below present how the clearing threshold impacts FCs and NFCs differently.

154. FCs' perspective:

Figure 44: FCs above the CT.

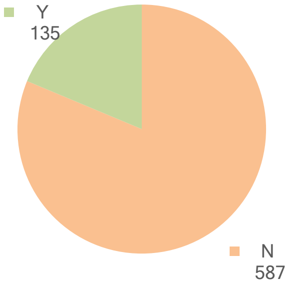
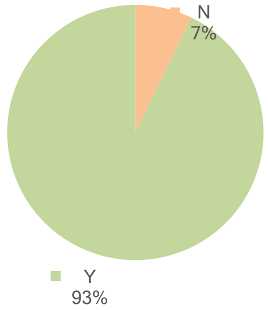


Figure 45: Notional captured by the CT.



155. NFCs' perspective:

Figure 46: NFCs above the CT.

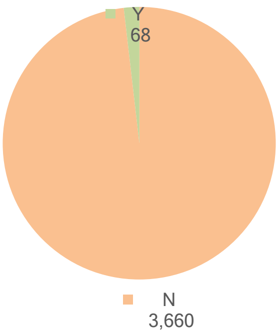
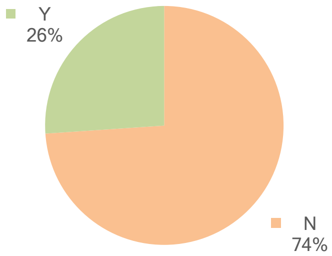


Figure 47: Notional captured by the CT.



156. We observe that 19% of the FCs trading in commodity derivatives are above the clearing threshold and this represents 93% of the total notional traded in commodity derivatives by FCs. In the case of NFCs, we observe there are more counterparties active in this market than FCs. Among the NFCs, 2% of the counterparties active in commodity derivatives are above the clearing threshold and this represents 26% of the notional traded in commodity derivatives by NFCs.

157. *Considerations*: It is apparent that the percentage of counterparties and notional captured by the clearing threshold in the EEA appears to be lower for NFCs than for FCs. The case of commodity derivatives, when comparing to credit and IRDs, appears to be consistent with the percentage of notional captured under the clearing threshold for FCs, with figures above 90%. In the case of NFCs, the percentage of notional captured by the clearing threshold for commodity derivatives appears to be in the lower range, with around 30% of the notional captured. It is also noted that the absolute number of NFCs trading with commodity derivatives (as happens also with credit derivatives) is lower than for other asset classes, which suggest NFCs are less significant from a systemic risk perspective. As mentioned, this was since EMIR inception at the centre of attention of co-legislators and the relevant references can be found in EMIR recitals.

Question 9:

Considering the current coverage provided by the clearing thresholds in relation to commodity 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.

8.3.2 Equity

158. Equity derivatives, like commodity derivatives, are not subject to the clearing mandate in the EU. However, counterparties need to calculate their positions in this asset class against the clearing threshold to determine whether they are subject to clearing (in the case of FCs) in the asset classes for which there is a mandate to clear, or to determine if other requirements start to apply (such as risk-mitigation techniques for NFCs).

159. The charts below present the number of groups and the percentage of notional traded in equity derivatives that are captured by the clearing threshold (1 billion euros for equity derivatives).

160. Groups' perspective:

Figure 48: Groups above the CT.

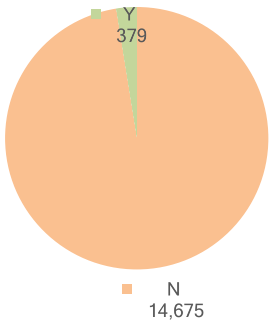
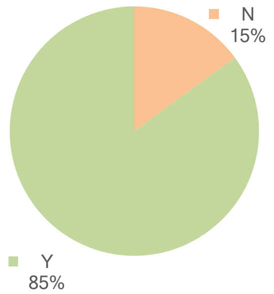


Figure 49: Notional captured by the CT.



161. We observe that there are 379 groups above the clearing threshold, which represents 3% of the groups active in equity derivatives. In terms of notional, 85%of the notional traded by groups in equity derivatives is captured by the clearing threshold.

162. Counterparties' perspective:

Figure 50: Counterparties above the CT.

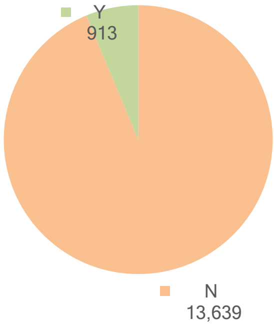
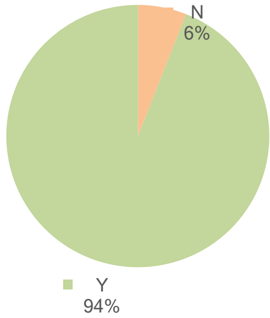


Figure 51: Notional captured by the CT.



163. From the graphs above we can see that 6% of the counterparties active in equity derivatives are above the clearing threshold. This represents 94% of the notional traded in equity derivatives. Overall, the current threshold appears to have a large coverage (above 90%) and proportional before considering the impact to FCs and NFCs separately.

164. The charts below present the impact of the clearing threshold on FCs and NFCs and on the notional traded by each type of counterparty.

165. FCs' perspective:

Figure 52: FCs above the CT.

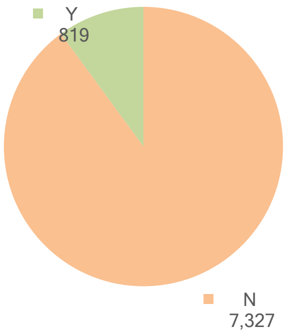
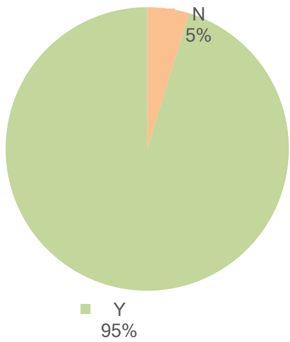


Figure 53: Notional captured by the CT.



166. NFCs' perspective:

Figure 54: NFCs above the CT.

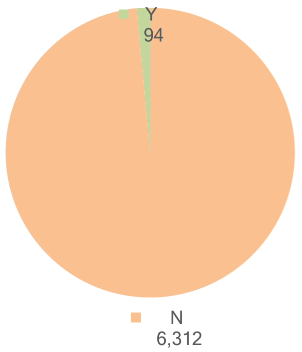
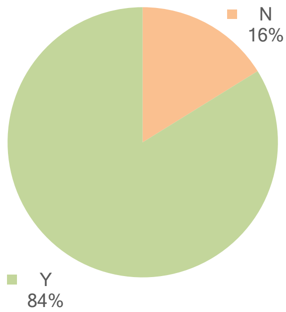


Figure 55: Notional captured by the CT.



167. We observe that 10% of the FCs trading equity derivatives appear to be above the clearing threshold and this represents 95% of the notional traded in this asset class by FCs. With regards to NFCs, only 1% of the counterparties active in equity derivatives are above the clearing threshold and this represents 84% of the notional traded by NFCs.

168. *Considerations:* These figures show that the current clearing threshold appears to have a large coverage for FCs (above 90%) and NFCs (above 80%). In addition, compared to other asset classes, in equity derivatives, a higher percentage of notional traded by NFCs is captured with only 94 NFCs above the clearing threshold. This should be read as a positive sign; all NFCs with bigger trading volumes in this asset class are captured by the threshold.

Question 10:

Considering the current coverage provided by the clearing thresholds in relation to equity 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.

8.3.3 Currency

169. The case of currency derivatives, also known as foreign exchange (FX) derivatives, is similar to commodity and equity derivatives, as currency derivatives are not subject to the clearing mandate in the EU. However, also like with commodity derivatives and equity derivatives, counterparties need to calculate their positions in currency derivatives against the clearing threshold to determine whether they are subject to clearing (for FCs) in the asset classes for which there is a mandate to clear, or to determine if other requirements start to apply (such as risk mitigation techniques for NFCs).

170. The charts below present the population of groups and counterparties and the percentage of notional traded in currency derivatives that are above the clearing threshold (3 billion euros for FX derivatives).

171. Groups' perspective

Figure 56: Groups above the CT.

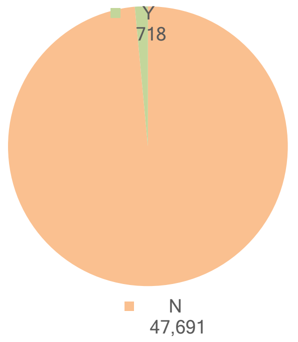
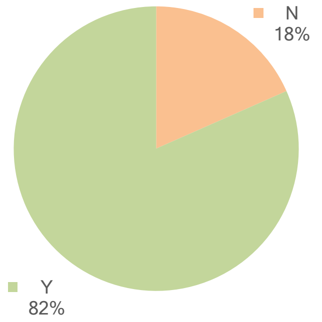


Figure 57: Notional captured by the CT.



172. From the total number of groups active in currency derivatives, 1% of the active groups (718) are above the clearing threshold. In terms of notional, 82% of the notional traded by groups in FX derivatives is captured by the clearing threshold.

173. Counterparties' perspective:

Figure 58: Counterparties above the CT.

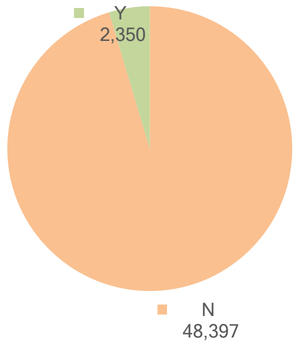
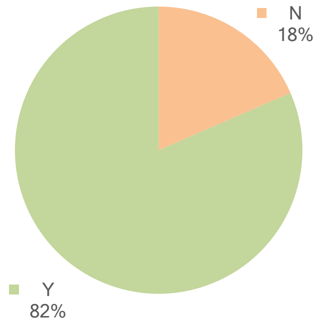


Figure 59: Notional captured by the CT.



174. From the graphs above we can see that only 5% of the counterparties active in currency derivatives are above the clearing threshold. This represents 82% of the notional traded in currency derivatives. A large portion of the total notional traded appears to be captured by the threshold and only impacting less than 5% of the counterparties (the ones with higher trading volume).

175. The charts below present the impact of the clearing threshold on FCs and NFCs and on the notional traded by each type of counterparty.

176. FCs perspective:

Figure 60: FCs above the CT.

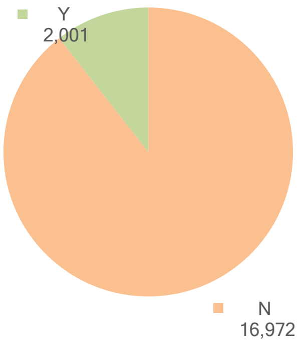
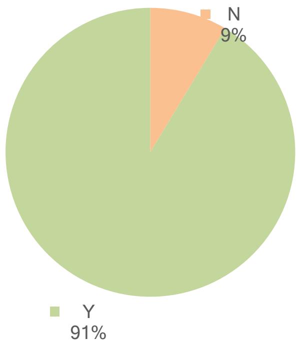


Figure 61: Notional captured by the CT.



177. NFCs' perspective:

Figure 62: NFCs above the CT.

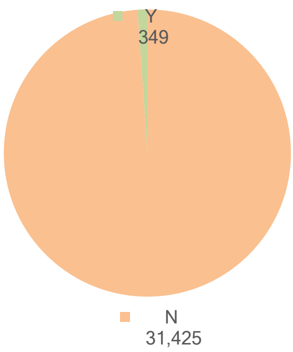
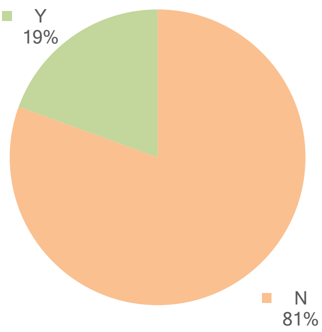


Figure 63: Notional captured by the CT.



178. We observe that 11% of the FCs trading currency derivatives appear to be above the clearing threshold and this represents 91% of the notional traded in this asset class by FCs. With regards to NFCs, only 1% of the counterparties active in currency derivatives are above the clearing threshold and this represents 19% of the notional traded by NFCs.

179. *Considerations*: These figures show that the current clearing threshold appears to have a large coverage for FCs, where the notional traded captured is above 90%. In the case of NFCs, the clearing threshold captures a relatively low percentage of entities and around 20% of the notional traded by NFCs.

Question 11:

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.

9 Outcome inferred from the data analysis on the application and impact of the current clearing thresholds

180. As evidenced by the statistics, the clearing thresholds impact the various asset classes and the percentage of counterparties and notional captured differently. These results also reflect that FCs and NFCs have different needs and trading strategies when it comes to OTC derivatives. In addition, it should be recalled that the calculation framework for FCs and NFCs differs. In particular, NFCs only count their positions in OTC that are not used for the purpose of hedging their commercial risks. In fact, the numbers in the statistics already take into account the carve-out for hedge trades entered into by NFCs as reported by NFCs to TRs[35].

181. The different regulatory regime applicable to FCs and NFCs and the fact that EMIR recognises NFCs as a group as less systemically important than FCs, could be arguments to support different clearing thresholds for NFCs, that might address better their specific profile and the share of the risk they represent. This discussion paper is an opportunity to gather stakeholders' views on how FCs and NFCs are impacted by the current clearing regime and the clearing thresholds as they are calibrated today and to suggest potential changes to the clearing thresholds to increase their efficiency by providing supporting data.

182. To facilitate the analysis of the impact of the current clearing thresholds, here is a summary of the charts presented in the previous section, compiling information on NFCs and FCs across asset classes.

Figure 50: Compilation of information on NFCs in the EEA.

Asset Class	**% NFC above CT**	**% Notional traded by NFC captured**
Credit (all)	11%	57%
IRDs (all)	1%	32%
Commodity	2%	26%
Equity	1%	84%
Currency	1%	19%

183. In general terms we see the percentage of notional captured differs across asset classes.

[35] Treatment of data is shown in the section Data and methodology respectively.

184. For credit and for equity derivatives, the applicable clearing thresholds capture more than 50% of the total notional traded by NFCs. The percentage of counterparties above the clearing obligation ranges from 1% to 11% of the entities active the market respectively.

185. Regarding IRDs, FX and commodity derivatives, the percentage of notional traded by NFCs captured by the clearing threshold is around 20% - 30% of the notional traded by NFCs in these asset classes. In all three cases, the population trading with each asset class above the clearing thresholds ranges between 1% and 2%.

186. The same exercise can be performed in relation to FCs using the data presented in the previous section and compiled to see in a more systematic form the percentage of population and notional traded by FCs captured under the current thresholds.

Figure 51: Compilation of information on FCs in the EEA.

Asset Class	**% FC above the CT**	**% Notional traded**
Credit (all)	24%	92%
IRDs (all)	30%	98%
Commodity	19%	93%
Equity	10%	95%
Currency	11%	91%

187. Overall, in relation to FCs activity, we observe that the figures both in terms of percentage of population and notional captured across by the clearing thresholds and across asset classes appear to have a consistent distribution. The percentage of notional captured in all cases is above 90% of the total notional traded by FCs (reaching 98% for IRDs). In terms of the population of counterparties captured by the clearing threshold, we observe the percentage ranges around 10% and 30%.

Question 12:

Beyond the different treatments between FCs and NFCs in the calculation, are there differences between the different types of counterparties that might justify a different calibration of the actual clearing thresholds?

In addition, please consider if a different calibration of the current clearing thresholds by type of counterparty should apply in the same manner to all asset classes. Please provide any supporting data that might help illustrate your response.

10 Simulations: Changes in population and notional with amended thresholds

188. In order to contribute to the discussion on whether the clearing thresholds are well calibrated to serve the purpose of preserve financial stability, in this section we present three new scenarios which correspond to simulations of the impact of slightly modifying the current clearing thresholds. This exercise allows to observe the impact of increasing and decreasing the thresholds for FCs and NFCs and for each asset class.

189. 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).

190. The second simulation increases the current clearing 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).

191. The third simulation increases the current clearing thresholds 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).

192. The simulations are run using the same methodology presented in section 4.3 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 subject to clearing presented in section 7 against the clearing thresholds but using only TR data.

Figure 52: Impact of current clearing thresholds (using the same methodology applied to the simulations, only using TR data).

ASSET CLASS	CLEARING OBLIGATION?	COUNTERPARTIES	NOTIONAL	FC COUNT	FC NOTIONAL	NFC COUNT	NFC NOTIONAL
CO	N	98%	37%	92%	12%	99%	76%
CO	Y	2%	63%	8%	88%	1%	24%
CR	N	88%	12%	87%	11%	93%	61%
CR	Y	12%	88%	13%	89%	7%	39%
CU	N	97%	21%	94%	11%	99%	85%
CU	Y	3%	79%	6%	89%	1%	15%
EQ	N	96%	7%	93%	6%	99%	17%
EQ	Y	4%	93%	7%	94%	1%	83%
IR	N	98%	9%	85%	5%	99%	67%
IR	Y	2%	91%	15%	95%	1%	33%

193. Note that figures in this table present slight differences with the numbers shown in Section 8. These differences are due to having computed counterparties positions under the clearing thresholds by using only the TR data. This table is used in this section as a reference to compare deviations in terms of population and percentage of notional when increasing or decreasing the current clearing thresholds. The following tables correspond to the simulations.

Figure 53: Simulation 1 (- EUR 0.5 billion applied to current clearing thresholds).

ASSET CLASS	CLEARING OBLIGATION?	COUNTERPARTIES	NOTIONAL	FC COUNT	FC NOTIONAL	NFC COUNT	NFC NOTIONAL
CO	N	98%	37%	91%	12%	99%	75%
CO	Y	2%	63%	9%	88%	1%	25%
CR	N	81%	8%	80%	6%	91%	51%
CR	Y	19%	92%	20%	94%	9%	49%
CU	N	97%	20%	93%	10%	99%	82%
CU	Y	3%	80%	7%	90%	1%	18%
EQ	N	94%	5%	90%	3%	99%	16%
EQ	Y	6%	95%	10%	97%	1%	84%
IR	N	97%	7%	79%	3%	99%	67%
IR	Y	3%	93%	21%	97%	1%	33%

194. This simulation shows that lowering in EUR 0.5 billion the current thresholds, the population and percentage of notional above the clearing thresholds would change in the following manner.

195. **Commodity derivatives:** We could say that decreasing the CT in 0.5 would have no material impact in the case of commodity derivatives. Regarding FCs, the population of FCs above the CT and the percentage of notional captured by the CT would remain the same (88% of the in the notional traded by FCs captured). In the case of NFCs, statistics would remain the same (with a slight increase of 1% on the percentage of notional captured).

196. **Credit derivatives** (considering all credit derivatives and not only the types subject to clearing): This simulation shows that the percentage of FCs above the clearing threshold would increase from 13% to 20% and the notional captured would increase from 89% to 94%. In the case of NFCs, the population of entities would increase from 7% to 9% and the notional captured, from 39% to 49%.

197. **Currency derivatives**: For FCs the change would not have a significant impact, both in terms and population and notional the percentages would only increase in 1%. In the case of NFCs, the population above the clearing threshold would remain at 1% of the NFCS active in FX derivative and the notional captured would increase in 3%, reaching 18% of the notional traded by NFCs active in this asset class.

198. **Equity derivatives**: In the case of equity derivatives, changing the threshold for FCs would increase in 3% the notional captured and the percentage of counterparties above the threshold. NFCs above the clearing threshold would increase from 7% to 10% and the notional captured, from 94% to 97%. For NFCs, the population would remain at 1% and the notional would increase 1%.

199. **IRDs**: The change in the CT would not have a significant impact in the case of IRDs. Regarding FCs, the population above the clearing threshold would increase from 15% to 21% and the notional from 95% to 97%. For NFCs, the change would not have any impact in terms of population nor in the percentage of notional captured.

200. *Considerations – Simulation 1*: we observe there is no significant impact by decreasing the current CT in 0.5 billion euros. Depending on the asset classes there is no change in terms of population that would be above the clearing obligation and that the percentage of notional that is captured. For the asset classes in which numbers move, the changes imply small deviations (e.g., increases of up to 5%). Only for credit derivatives figures move in a bit of a wider range, especially for NFCs, which at the same time are the less impactful from a systemic risk perspective.

Figure 54: Simulation 2 (+EUR 0.5 billion applied to current clearing thresholds).

ASSET CLASS	CLEARING OBLIGATION?	COUNTERPARTIES	NOTIONAL	FC COUNT	FC NOTIONAL	NFC COUNT	NFC NOTIONAL
CO	N	98%	38%	92%	13%	99%	76%
CO	Y	2%	62%	8%	87%	1%	24%
CR	N	91%	15%	90%	14%	93%	62%
CR	Y	9%	85%	10%	86%	7%	38%
CU	N	97%	22%	94%	12%	99%	85%
CU	Y	3%	78%	6%	88%	1%	15%
EQ	N	97%	9%	95%	8%	99%	18%
EQ	Y	3%	91%	5%	92%	1%	82%
IR	N	98%	10%	87%	5%	99%	68%
IR	Y	2%	90%	13%	95%	1%	32%

201. This simulation shows that increasing by EUR 0.5 billion the current thresholds, the population and percentage of notional above the clearing thresholds would change in the following manner.

202. **Commodity derivatives:** For this asset class the changes there are no material changes. The statistics would remain the same for FCs and NFCS, only decreasing in 1% the population of FCs captured by the CT.

203. **Credit derivatives** (considering all credit derivatives and not only the classes subject to clearing): the percentage of FCs above the clearing threshold and the notional captured would decrease 3% respectively. In the case of NFCs, the population of entities would remain the same and the notional captured would decrease 1%.

204. **Currency derivatives**: the population of FCs above the clearing threshold would remain the same and the notional captured would decrease only 1%. For NFCs figures would remain unchanged.

205. **Equity derivatives**: FCs above the clearing threshold would decrease from 7% to 5% and the notional captured, from 94% to 92%. For NFCs, this change in the TC would only decrease the notional captured in 1%.

206. **IRDs**: FCs above the clearing threshold would decrease 2% and the notional would remain at 95%. For NFCs, the change would only decrease 1% the notional traded by NFCs captured by the CT.

207. *Considerations – Simulation 2*: we observe there is no significant impact by increasing the current CT in 0.5 billion euros. Depending on the asset classes changes appear to be minimal, with moves as small as 1% decrease. The most significant move is a 3% decrease in the notional traded by FCs in credit derivatives.

Figure 55: Simulation 3 (+EUR 1 billion applied to current clearing thresholds).

ASSET CLASS	CLEARING OBLIGATION?	COUNTERPARTIES	NOTIONAL	FC COUNT	FC NOTIONAL	NFC COUNT	NFC NOTIONAL
CO	N	98%	38%	92%	13%	99%	76%
CO	Y	2%	62%	8%	87%	1%	24%
CR	N	92%	18%	92%	16%	94%	65%
CR	Y	8%	82%	8%	84%	6%	35%
CU	N	98%	23%	94%	13%	99%	86%
CU	Y	2%	77%	6%	87%	1%	14%
EQ	N	97%	10%	96%	8%	99%	18%
EQ	Y	3%	90%	4%	92%	1%	82%
IR	N	98%	10%	87%	6%	99%	69%
IR	Y	2%	90%	13%	94%	1%	31%

208. This simulation shows that increasing by EUR +1 billion the current thresholds, the population and percentage of notional above the clearing thresholds would change in the following manner.

209. **Commodity derivatives:** the population of FCs would remain at 8%, and the notional captured would decrease 1%. In the case of NFCs, there would be no impact.

210. **Credit derivatives** (considering all credit derivatives and not only the classes subject to clearing): the percentage of FCs above the clearing threshold would decrease from 13% to 8% and the notional captured would decrease from 89% to 84%. In the case of NFCs, the population of entities would decrease 1% and the notional captured, from 39% to 35%.

211. **Currency derivatives**: there would be no significant changes, the percentage of population above the clearing threshold would remain the same for FCs and NFCs. The notional captured would decrease only by 1% for FCs and NFCs respectively.

212. **Equity derivatives**: the percentage of population above the clearing threshold would remain the same for FCs and NFCs. The notional captured would decrease 2% for FCs, from 94% to 92% and decrease 1% for NFCs.

213. **IRDs**: the population of FCs above the clearing threshold would decrease 2% and the notional traded by FCs captured would decrease 1%, 94%. For NFCs, the change

would not have any impact in terms of population, which would remain lower than 1%, and the notional captured would decrease 2%.

214. *Considerations – Simulation 3*: We observe there is not a significant impact on the population and notional captured by increasing the clearing thresholds 1 billion euros. The changes are more relevant in relation to credit derivatives where the notional captured would decrease around 5% for FCs and NFCs.

215. Overall, the simulations indicate that the coverage provided by the current clearing thresholds would not be too sensitive to slight changes. The population of counterparties and the share of notional captured remain largely similar. On the one hand, this might indicate that there are not too many counterparties that manage their activity to remain close to the thresholds and that they would not represent a significant portion of the risk.

Question 13: **Looking at the simulations presented in the paper and at the impact they would have, do you have any views on the sensitivities of the thresholds?**

11 Conclusion

216. The first aim of the report is to present the current situation in terms of number of counterparties and share of the notional captured by the current levels of the clearing thresholds. We observe from these statistics that the EMIR regime seems to have worked rather adequately in its first years of implementation, especially for FCs, for which the clearing thresholds manage to ensure a large coverage in terms of notional captured while maintaining a certain proportionality in their application as only a small percentage of counterparties are captured.

217. However, these results also evidence differences between the different asset classes and more importantly between the two types of counterparties (FCs and NFCs). As expected, the coverage of the current clearing thresholds in relation to notional traded by NFCs in the different asset classes appears to be lower than for FCs. It is noted that NFCs since EMIR's inception are considered to be less systemically important from a risk perspective because overall, they trade in lower volume than FCs and also because in many cases they use OTC derivatives to manage and hedge their commercial risks. In relation to the different nature and trading strategy of NFCs, it is important to mention that the hedging exemption seems to have proven its purpose and allowed to delineate a more proportionate impact of the clearing thresholds on NFCs, even if applying the same set of thresholds as FCs.

218. Nevertheless, this review is an opportunity to reflect on how the clearing thresholds and the requirements triggered when exceeding them affect counterparties, and NFCs in particular. ESMA takes the opportunity of this review to receive input from stakeholders about any concerns or potential benefits associated to the EMIR regime and the current thresholds. The feedback we collect from stakeholders on the efficiency of the current thresholds will be carefully analysed by ESMA.

219. Another element that stands out from the findings presented in this report is that moving the current clearing thresholds slightly does not have a significant impact on the population of counterparties and notional captured by the thresholds. This could be read as a positive sign that would indicate that the thresholds are adequate to capture, as it had been intended, the market participants with higher volumes of transactions and potentially higher levels of systemic risk.

220. At the same time, ESMA is aware of various adjustments that counterparties under EMIR have had to adapt to in a short period of time, such as the consequences derived from Brexit, the implementation of the EMIR Refit amendments as well as other aspects such as the phasing-in for initial margin requirements and the progressive transition to new risk-free rates. For that reason, any modification of the regime should strike the right balance between optimising the current framework and ensuring certain regulatory stability in the thresholds. Counterparties would benefit from having as much visibility as possible regarding their self determination of whether they are above or below the clearing thresholds and on the clearing status of their counterparts.

221. Still, some of the differences highlighted in the report and the broader questions raised in this report are an opportunity to collect views from stakeholders on the current calibration of the clearing thresholds, on how they apply to the population of FCs and NFCs respectively and on how the EMIR framework linked to the current clearing thresholds works in a globalised financial market with respect to other jurisdictions with similar characteristics.

12 Annex I – Summary of questions

222. Question 1:
Please explain if you see a need for further clarification on how to identify OTC contracts for the purpose of the calculation of the positions to be compared to the clearing thresholds.

223. Question 2:
Please explain if you see a need for further clarification to identify OTC contracts that can be considered as reducing risks directly relating to commercial activity or treasury financing activity. And please mention any additional aspects to be further considered with regards to the hedging exemption.

224. Question 3:
Please provide information and examples on how counterparties count fungible ETDs and OTC derivatives for the purpose of the calculation of the clearing thresholds.

225. Question 4:
Please provide data and arguments to illustrate the potential impact of the lack of an equivalence decision under Article 2a of EMIR and what could be done to alleviate your concerns (besides an equivalence decision)? Please specify the kind of transactions and activities that would be affected and the purpose of those, and whether there are alternatives.

226. Question 5:
Please describe the scenarios when transactions do not qualify as hedging transactions.

227. Question 6:
Please describe your views on how the EMIR framework works (also compared to other regimes) for the purpose of the clearing thresholds and the requirements triggered by those? Please provide examples and supporting data.

228. Question 7:
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.

229. Question 8:
Considering the current coverage provided by the clearing thresholds in relation to interest rate 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.

230. Question 9:
Considering the current coverage provided by the clearing thresholds in relation to commodity 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.

231. Question 10:
Considering the current coverage provided by the clearing thresholds in relation to equity 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.

232. Question 11:
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.

233. Question 12:
Beyond the different treatments between FCs and NFCs in the calculation, are there differences between the different types of counterparties that might justify a different calibration of the actual clearing thresholds?

In addition, please consider if a different calibration of the current clearing thresholds by type of counterparty should apply in the same manner to all asset classes. Please provide any supporting data that might help illustrate your response.

234. Question 13:
Looking at the simulations presented in the paper and at the impact they would have, do you have any views on the sensitivities of the thresholds?