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| 17 November 2021 |

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| Reply form for the Discussion Paper on the review of the clearing thresholds under EMIR |
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| Date: 17 November 2021 |

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Discussion Paper on the review of the clearing thresholds published on the ESMA website.

*Instructions*

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

* use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
* do not remove the tags of type <ESMA\_QUESTION\_DP\_EMIR\_CTs> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
* if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses 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.

**Naming protocol**

In order to facilitate the handling of stakeholders’ responses please save your document using the following format:

ESMA\_DP\_EMIR\_CTs\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

e.g. if the respondent were ESMA, the name of the reply form would be:

ESMA\_ DP\_EMIR\_CTs\_ESMA\_REPLYFORM

***Deadline***

Responses must reach us by **19 January 2021.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

***Publication of responses***

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that 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 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](http://www.esma.europa.eu) under the headings ‘Legal notice’ and ‘Data protection’.

# General information about respondent

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| --- | --- |
| Name of the company / organisation | Dutch Banking Association (NVB) |
| Activity | Banking sector |
| Are you representing an association? |  |
| Country/Region | Netherlands |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_DP\_EMIR\_CTs>

TYPE YOUR TEXT HERE

<ESMA\_COMMENT\_DP\_EMIR\_CTs>

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.

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_1>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_1>

1. 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.

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_2>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_2>

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

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_3>

1. 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.

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_4>

The lack of equivalence decisions under article 2a of EMIR triggers challenging situations in relation to trading of derivatives on third country trading venues not determined as equivalent under article 2a of EMIR (ETDs). On the basis of article 2(7) of EMIR, such ETDs should be treated as OTC derivatives which is very confusing because they are not.   
For such ETDs traded on third country trading venues, EU participants on the third country trading venue have to comply already with the applicable rules and regulations on that venue. In addition they have to comply with the EMIR risk management and margin requirements which are not really compatible because intended for OTC derivatives. Also the EMIR clearing obligations could be applicable on these ETD derivatives in case the third county CCP used for these ETD derivatives is not determined to be equivalent on the basis of article 25 of EMIR. An undesired and confusing consequence is also that these ETDs have to be added to the clearing thresholds intended for OTC derivatives. This can have huge consequences for participants on such third country venue with a NFC- or FC - status and other NFC-/FC- counterparties in the same group.

To our opinion, most of the undesired consequences could be solved by aligning the list of equivalent jurisdictions/ trading venues under article 2a with the broader list of equivalent jurisdictions / CCPs under article 25 of EMIR.  This alignment is justified because the third country trading venue for trading  and third country CCP for clearing should be seen in connection  with each other and are also complementary to each other. Equivalence decisions on the basis of article 2a cover derivatives traded on a third country trading venue and cleared on a third country CCP and equivalence decisions under article 25 EMIR cover derivatives not traded on a third country trading venue but cleared by a third country CCP.

We also notice that third country regulators do not always see the difference and assume that an equivalence decision of the CCP in their jurisdiction under EMIR includes the equivalent decision of the trading venue under article 2a. of EMIR.

Although not part of this discussion paper, we think that next to the alignment of the equivalence decisions under article 2a and 25 of EMIR, alignment should take place of the equivalence decisions under article 25 of EMIR and article 28 of MIFIR. This because the derivatives clearing obligation under EMIR and the derivatives trading obligation under MIFIR should be seen in connection with each other.

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_4>

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

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_5>

1. 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.

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_6>

In comparison to other OTC derivatives regimes, EMIR seems to be the most restrictive, this results in a competitive disadvantage against counterparties subject to other regimes.   
For instance, under other margin regimes counterparties may apply a threshold for the exchange of variation margin (under the Australian regime, AUD 3billion and under the Canadian regime, CAD 12 billion). Other margin regimes (Brazil and Singapore) exclude physically settled commodity derivatives form margin requirements. EMIR margin requirements should be in line with other margin regimes in order to ensure a level playing field, otherwise non-EU counterparties will be more likely to engage in non-cleared OTC derivative transactions with other non-EU counterparties rather than EU counterparties.  The recent equivalence decisions under art. 13(2) EMIR  (CID (EU) 2021/1103, 2021/1104, 2021/1105, 2021/1106, 2021/1107 and 2021/1108 on art. 11 EMIR equivalence) do not provide counterparties subject to EMIR sufficient relief from the applicability of duplicative rulesets. As the The usability of these equivalence decisions is limited, either because partial equivalence (only for some requirements) is granted or because the equivalence is conditional and still require compliance with stricter EMIR requirements.

With regard to the equivalence of risk mitigation requirements, a patchwork of equivalent requirements has been created. For institutions active in multiple non-EU jurisdictions there is little benefit from the equivalence decisions as for most of the regimes deemed equivalent under the art. 13(2) EMIR equivalence decisions (CID (EU) 2021/1103, 2021/1104, 2021/1105, 2021/1106, 2021/1107 and 2021/1108 on art. 11 EMIR) only certain mitigation techniques are equivalent. In order to make use of the equivalence, extensive implementation efforts would be required in order to distinguish the different requirements under each non-EU regime. Only where a non-EU regime is fully equivalent, it can be beneficial for EMIR regulated entities to offer non-EU counterparties the option to only comply with their local ruleset rather than with EMIR. Where there is no full equivalence, those non-EU clients would still be required to (partially) comply with EU rules they are not familiar with, resulting in a competitive disadvantage for EMIR regulated entities operating outside of the EU.

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_6>

1. 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.

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_7>

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<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_7>

1. 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.

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_8>

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<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_8>

1. 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.

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_9>

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<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_9>

1. 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.

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_10>

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<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_10>

1. 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.

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_11>

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<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_11>

1. 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.

<ESMA\_QUESTION\_ DP\_EMIR\_CTs\_12>

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<ESMA\_QUESTION\_DP\_EMIR\_CTs\_12>

1. 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?

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_13>

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<ESMA\_QUESTION\_DP\_EMIR\_CTs\_13>