**Reply** **form**

Conditions of the Active Account Requirement

 Responding to this paper

ESMA invites comments on all matters in the Consultation Paper and in particular on the specific questions in this reply form. 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 **27 January 2025.**

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

* Insert your responses to the questions in the Consultation Paper in this reply form.
* Please do not remove tags of the type <ESMA\_QUESTION\_AAR\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
* If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
* When you have drafted your responses, save the reply form according to the following convention: ESMA\_AAR\_nameofrespondent.

For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA\_AAR\_ABCD.

* Upload the Word reply form containing your responses to ESMA’s website (**pdf documents will not be considered except for annexes**). 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 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.

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# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | Dutch Banking Association |
| Activity | Banking sector |
| Are you representing an association? |[x]
| Country/Region | Netherlands |

# Questions

1. Are there any aspects of the AAR scope on which ESMA has based its quantitative analysis and its policy choices that ESMA should consider detailing further*?*

<ESMA\_QUESTION\_AAR\_01>

We take note of the interpretation of ESMA’s AAR scope on which it has based its quantitative assessment. Given that EMIR 3.0. Level 1 text is in some places ambiguous, we believe that further clarifications/amendments are necessary regarding the methodologies for calculating the various thresholds. In our view, examples or concrete calculations might help to clarify the different AAR requirements.

Group-Level Application:

* Confirmation should be provided that when a counterparty is subject to **group consolidated supervision** in accordance with the CRD, the counterparty should consider all derivative contracts that are cleared by that counterparty or other entities in the group to assess whether it is subject to the AAR and the representativeness obligation.
* In addition, paragraph 40 of the Consultation Paper states that the entities that are part of a group subject to consolidation in the EU can fulfil the operational and representativeness conditions of the AAR through **one entity in the group** (i.e. only one entity in the group would be required to open an account, meet the operational and representativeness obligations on behalf of the whole group, and subsequent reporting obligation, on behalf of the group). To provide legal certainty on the interpretation by ESMA, confirmation should be provided that a single entity within the group can fulfill the operational and representativeness obligations on behalf of the group, including the subsequent reporting requirements.This should be made explicit in the RTS, by a amendment to Article 4(1) of the RTS.

Exemptions and Status Changes:

* The exemption to the AAR foreseen for counterparties clearing at **least 85% of their derivatives activity on an EU CCP** aims at incentivising firms to clear a very high proportion of trades at an EU CCPs. Paragraph 46 of the Consultation Paper suggests that 85% of derivative contracts is to be measured in gross notional value of the aggregate month-end average position for the previous 12 months. However, EMIR Level 1 text does not prescribe a look back period applying a 12-month lookback period [from entry into force of the active account RTS]. As such, few counterparties will be able to move sufficient clearing into the EU in such a short time frame. To ensure that firms are incentivised and able to make use of the 85% exemption, the methodology for the calculation of the exemption threshold should be aligned with the EMIR 3.0 effective dates and timelines.
* Clarifications should be provided on how to address subsequent changes to the AAR-status. In particular, on the necessary transition period following such change of status.

General application. Additional guidance should address:

* Clarifications concerning the application of AAR-exemption under Art. 7a (4), fifth sub-paragraph: “Where the resulting number of trades exceeds half of the total trades of that counterparty for the preceding 12 months, the representativeness obligation referred to in paragraph 3, point (d), shall be considered fulfilled where that counterparty clears at least one trade in each of the most relevant subcategories per class of derivative contracts per reference period.” Specifically, on what does ‘total trades’ mean, is this to be calculated per class subject to the AAR? Furthermore, what is the timing of the look-back? It makes sense that this look-back is at the start of each AAR compliance period in order to allow counterparties to steer transaction to EU CCPs, where possible.
* Clarification on the average of 5 transactions per reference period on an annual basis where the total amount of transactions for any of the most relevant subcategories is low. Even in the most relevant subcategories, counterparties may transact less than 10 or even 5 transactions (per reference period) at a Tier 2 CCP, particularly where the maximum combination of maturity classes and trade sizes is used. Potentially, this is compensated by a higher amount of trades in in the same subcategory in another reference period during the year, but this is not a given. ESMA should explain how counterparties should aim to comply with the AAR in this situation scenario, as it should not be expected that counterparties do additional transactions just to meet the minimum amount of transactions. In such cases the average minimum amount of 5 transactions per reference period at an EU CCP, may not be proportionate to the activities.

<ESMA\_QUESTION\_AAR\_01>

1. Do you agree with the above approach for condition (a)? Are there other requirements that ESMA should consider for meeting condition (a)?

<ESMA\_QUESTION\_AAR\_02>

NVB emphasizes that parties subject to the AAR should not be unduly burdened with demonstrating compliance of condition a. In this regard the proposal could be significantly simplified in order to avoid unnecessary, duplicative and burden-some new documentation and information requirements.

The single most important and conclusive factor demonstrating the functionality is proof of the existence of an operating clearing account with an EU-CCP for the relevant scope of transactions/products.

The need to provide additional, detailed documentary proof is generally questionable where parties clear the relevant types of transactions/products on a regular basis with an EU-CCP: In these cases, the requisite functionality of clearing accounts (including IT-connectivity) is already effectively, objectively, and comprehensively being proven by the TR-reports and any further documentary proof should not be necessary. Requiring such documentary proof is not aligned with the Commission's ambitions to decrease (non-essential) administrative burdens that are detrimental to an efficient and competitive EU market.

To the extent and where TR-reports are considered to be insufficient proof of the existence of functional clearing accounts (and IT-connectivity), the simplest and most direct option to demonstrate the establishment of such functional accounts would be the certificate of the CCP proposed in Section 4.2 item 68 of the Report/ Art. 2 (1) (c) and 3 (1)(b) of the Draft RTS): This CCP-certifications regarding the capabilities of the account necessarily also confirm the existence of fully functional clearing accounts.

A confirmation of the existence of operational clearing account also always confirms the establishment of collateral/cash accounts since clearing accounts always and necessarily include the set-up for collateralisation in accordance with rules and regulations of the CPP. In this light, the reference in art. 1(1)(c) Draft RTS to “with sufficient financial resources to meet obligation arising from the direct or indirect participation in an authorized CCP” also seems redundant and that part can in fact not be verified by the CCP, so cannot be part of a signed written statement by the CCP. Thus, there is no tangible need for a separate and independent proof of the establishment of the collateralisation set-up.

Consequently, where the existence of the clearing accounts has already been confirmed via the TR-reports and/or a CCP-certificate, the only additional aspects which may potentially requiring separate proof would be the internal processes/policies (including, where relevant, the client clearing arrangements). However, these processes and policies are already subject to regular supervisory review and thus should not require new/additional/separate formal proof and reporting obligations.

Finally, RTS Article 1 paragraph (1) (c) requirement to “*hold cash and collateral accounts with sufficient financial resources to meet the obligations arising from direct participation in an EU CCP*”. This implies that counterparties are required to have sufficient financial resources to meet the stress-testing requirements set out in draft RTS Article 3.

While such account should allow the ability of provisioning sufficient cash and collateral we would argue this requirement should not mean the accounts need to be provisioned beyond what is necessary for the existing volume cleared through these accounts. This requirement is not included in the Level 1 text. Moreover, this provision contradicts the paragraph 67 of the ESMA’s consultation paper which specifies that under Article 37 of the Level 1 text the “operational capacity” [of the clearing members] “should not include the financial resources of the clearing participant”.

We suggest ESMA amends draft RTS Article 1 paragraph 1 (c) as follows: “*cash and collateral accounts ~~with sufficient financial resources to meet the obligations arising from direct participation in an EU CCP~~”.*

<ESMA\_QUESTION\_AAR\_02>

1. Do you agree with the above approach for conditions (b) and (c)?

<ESMA\_QUESTION\_AAR\_03>

It is pragmatic to treat EMIR Article 7a (3) conditions (b) and (c) as a single issue focused on whether the active account can be used to clear a large volume of transactions in a short period. However, a threefold increase in clearing of notional outstanding in the relevant derivative contracts over a one-month period is seen as a very extreme scenario.

Additionally, The certification process seems unnecessarily cumbersome with clearing members and clients providing clearing services providing certification (written statements) from the CCP. It would be much more efficient if ESMA gets the relevant certification from the EU CCPs directly.

In any case, it is necessary for the RTS to include a requirement on the EU CCP, following successful testing for compliance with the operational conditions, to provide the written statement upon request, without undue delay, for free, in English if requested. In the draft RTS, the obligation falls on counterparties to request the statement from the CCP, but there is no obligation for the CCP to provide such a statement when requested. ESMA does not clarify the consequences of a CCP failing to provide such a certification.

With regards to resources/dedicated staff - item 62 and 66 of the Report/ Art. 2 (1) (b) of the Draft RTS), the requirement to dedicate a staff member is neither proportional nor practical. Resources and personnel should not be subject to formalistic/rigid demands. The internal operational set-up will by highly depend on the specifics of the operational set-up and business model. For many institutions a single person will probably not be responsible for the entire processes concerning derivatives clearing nor would this person be dedicated to this role. Additionally, responsible staff may also change frequently between reporting periods.

A general obligation to dedicate adequate/sufficient resources and personnel will be sufficient to grant institutions sufficient flexibility while providing supervisory authorities a sufficient basis for review and intervention in case of deficiencies.

<ESMA\_QUESTION\_AAR\_03>

1. Do you agree with the proposed approach for the annual stress-testing conditions (a), (b) and (c)?

<ESMA\_QUESTION\_AAR\_04>

As stated in question 3, the scenario of a 85% increase seems a very extreme scenario and appears to be arbitrarily determined. **If EU counterparties were no longer able to clear via a non-EU CCP and maintain their already existing position at such CCP, these positions would not be transferred. Rather, they would be terminated by way of a close-out (including collateral) and only a subset of these would then be re-stablished in the form of new transactions (partially mirroring the former positions held at the non-EU CCP) with an EU-CCP**. Therefore, we suggest that a lower increase of clearing activity would provide a more realistic (stress)test.

<ESMA\_QUESTION\_AAR\_04>

1. Do you agree with the differentiated frequency for the stress-testing depending on the counterparties’ clearing activities? Would you suggest any other way to take into account the proportionality principle?

<ESMA\_QUESTION\_AAR\_05>

Article 7a(4) subparagraph 4 of EMIR 3.0 requires stress-testing to be done at least once a year, which in our view should be sufficient. Operational conditions are not likely to change very often. From a risk management perspective it would therefore not be required to have more frequent stress-testing than the minimum requirement that EMIR 3.0 stipulates.

The proposed differential stress-testing intervals raise the operational constraints and administrative burden for both EU actors and supervisors, without any tangible benefit for EU actors nor for the EU financial stability.

<ESMA\_QUESTION\_AAR\_05>

1. Do you agree with the proposed classes of derivatives for EUR OTC IRD?

<ESMA\_QUESTION\_AAR\_06>

We continue to believe that ESMA should only identify 3 classes in total across the services of Substantial Systemic Importance (IRD denominated in EUR and PLN and STIR denominated in EUR), we have no particular concern with the 3 classes identified (EUR Fixed-to-float, EUR OIS, EUR FRA).

NVB would again stress the point that the active account requirement should not result in Financial Institutions being forced to execute additional and/or unnecessary transactions.

<ESMA\_QUESTION\_AAR\_06>

1. Do you agree with the proposed classes of derivatives for PLN OTC IRD?

<ESMA\_QUESTION\_AAR\_07>

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<ESMA\_QUESTION\_AAR\_07>

1. Do you agree with the proposed classes of derivatives for EUR STIR?

<ESMA\_QUESTION\_AAR\_08>

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<ESMA\_QUESTION\_AAR\_08>

1. Do you agree with the proposed maturity and trade size ranges for each class of derivatives in EUR OTC IRD?

<ESMA\_QUESTION\_AAR\_09>

While we regret that ESMA has identified the maximum number of maturity (4) and maximum number of trade size buckets (3), we have no particular concern with the proposed maturity and trade size buckets.

As emphasized before, we stress that the active account should not result in unnecessary transactions, or unnecessarily modification of transactions to meet specific targets for size or maturity ranges.

<ESMA\_QUESTION\_AAR\_09>

1. Do you agree with the proposed maturity and trade size ranges for each class of derivatives in PLN OTC IRD?

<ESMA\_QUESTION\_AAR\_10>

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<ESMA\_QUESTION\_AAR\_10>

1. Do you agree with the proposed maturity and trade size ranges for each class of derivatives in EUR STIR?

<ESMA\_QUESTION\_AAR\_11>

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<ESMA\_QUESTION\_AAR\_11>

1. Do you agree with the proposed number of most relevant subcategories for each clearing service of substantial systemic relevance? Do you think this should be set at a more granular level (i.e. per class of derivatives)?

<ESMA\_QUESTION\_AAR\_12>

ESMA refers in par. 90 of the Consultation Paper to the scenario where counterparties can meet the AAR requirement by doing only 1 trade per subcategory instead of 5. Further detail and an example on this scenario would be appreciated.

Guidance on the scenario where one of the most relevant subcategories would contain less than 5 trades (averaged per reference period) at a Tier 2 CCP, would be appreciated, as currently this may result in a counterparty being required to do additional transactions that don’t have an independent commercial reason but for compliance with the AAR. NVB would again stress the point that the active account requirement should not result in Financial Institutions being forced to execute additional and/or unnecessary transactions.

<ESMA\_QUESTION\_AAR\_12>

1. Do you agree with the proposed reference periods for EUR OTC IRD? Do you think the reference periods should be set at a more granular level (i.e. class of derivatives)?

<ESMA\_QUESTION\_AAR\_13>

Counterparties active in EUR OTD IRD, may have a different levels of activity in each of the classes (IRS, FRA, OIS). It would be more proportionate if counterparties can determine separate reference periods per such class based on their activity in that class. The current generic reference to “100 billion euro in derivative contracts” does not cater for this. A counterparty that on the lowest level of granularity is above “100 billion euro in derivative contracts”, may have limited activity in a specific class, e.g. EUR OIS. Where all classes are subject to the same (1 month) reference period, this counterparty may not be able or at least have severe difficulties to comply with the AAR in a – from the perspective of the counterparty – less relevant class. This would put a disproportionate burden on the activities in that specific class which on a counterparty level does not seem aligned with the objective of shifting the substantially significant activities to EU CCPs.

With regards to the reference period itself, further clarity would need to be provided on the methodology of determining the reference period. One important question remains whether the reference period would be determined on a fixed or rolling period. Secondly, it is necessary to determine whether the reference period will be applied on a backward-looking or current-period basis.

From a operational and reporting standpoint a reference period with fixed periods that are backward-looking would be significantly easier to implement by parties in scope.

Moreover, it is unclear how parties should compute these annual averages.

<ESMA\_QUESTION\_AAR\_13>

1. Do you agree with the proposed reference period for PLN OTC IRD? Do you think that the reference periods should be set at a more granular level (i.e. class of derivatives)?

<ESMA\_QUESTION\_AAR\_14>

See our response to question 13

<ESMA\_QUESTION\_AAR\_14>

1. Do you agree with the proposed reference periods for EUR STIR referenced in Euribor? Do you agree with the proposed reference periods for EUR STIR referenced in €STR?

<ESMA\_QUESTION\_AAR\_15>

See our response to question 13

<ESMA\_QUESTION\_AAR\_15>

1. Do you agree with the proposed approach for the reporting of the activity and risk exposures of the counterparty subject to the active account requirement?

<ESMA\_QUESTION\_AAR\_16>

NVB would argue all reporting requirements under Articles 7 to 10 needs be comprehensively reviewed to reduce their complexity and granularity. Overall, the proposed reporting requirements go beyond what is required by Level 1.

Moreover it should be noted that parties already need to report a substantial amount of information under EMIR. The proposed approach is thereby inconsistent with the EU’s broader objective of simplifying EU rules and reduce the administrative and reporting burden for corporations. Requiring firms to send both aggregate data (table 2 and 3) and transactional data would require a significant IT built that are highly complex to fulfil operationally for EU actors and would come at considerable costs.

Meanwhile the reported data is of limited use to national or European supervisors, either because the required information is already accessible to these authorities or because it appears irrelevant for their supervisory duties.

In the public hearing ESMA indicated it needs comprehensive information about whether a counterparty is in scope of AAR or not. But it should not be necessary for the NCA (or ESMA) to verify whether a counterparty meets the conditions to be subject to the active account requirement. Currently, the EMIR clearing obligation is subject to a notification requirement without further substantiation. It would seem proportionate that where a counterparty has indicated it is subject to the clearing obligation and the active account requirement, that the supervisor relies on that ‘self-classification’. Only where the NCA has reasons to believe that a counterparty is subject to a requirement but that counterparty indicates that it is not, it seems useful for the NCA to request that counterparty to substantiate why it deems itself out of scope to the requirement. There is no direct benefit in establishing an administrative burden for market participants in order to proof that they are subject to a certain, and in case of the AAR, an extensive requirement. In fact, where a counterparty that formally is not subject to the AAR, but is voluntarily committing itself to it, it would only be supportive of the objective of the requirement. therefore, removing certain details from the reporting obligation, e.g. information on uncleared trades and margin information would remove administrative burdens but not increase the risk of non-compliance with the objective of incentivising clearing at an EU CCP.

* Table 1, field 5, seems redundant as being subject to the clearing obligation is a condition to be subject to the AAR, so answer would always be yes.
* Table 1, field 6, would make sense that here both the CCP and clearing member are indicated and not just the clearing member.
* Table 1, Field 7, entities within the group, should only apply to counterparties subject to and that are entering into cleared transactions (and are effectively subject to the AAR).
* Table 1. field 9, only a list of the UTIs of trades that are used towards complying with the AAR should be sufficient,

The most basic approach could be: an overview of the LEIs of counterparties in the group subject to the AAR, the LEI of the report submitting entity, a list of the 5 most relevant subcategories and the UTIs of 5 trades at a EU CCP per such subcategory (per reference period). Such an approach should be sufficient to check compliance with the AAR. (While it can also be argued that just reporting the number of trades per subcategory can also be sufficient.) A proportionate reporting regime should start with some level of trust and only be expanded in case it is proven to not be fully fit for its purpose.

Finally, ESMA should provide clarity on the start dates of such reporting periods given the ongoing work on level 2 legislation.

<ESMA\_QUESTION\_AAR\_16>

1. Do you consider that including information on margin activity in the AAR reporting requirement would provide valuable information on the activities and risk exposures of the counterparty?

<ESMA\_QUESTION\_AAR\_17>

We do not see a need to extent the AAR reporting requirements with information on margin activity as a lot of such data is already reported through alternative reporting requirements to ESMA. As such it is unnecessarily burdensome to extend the AAR reporting requirements further. Moreover, it remains unclear what valuable information aggregate VM for cleared transactions would provide. The VM is passed on a daily/intraday basis.

<ESMA\_QUESTION\_AAR\_17>

1. Do you consider that including reporting on Unique Trade Identifiers (UTIs) would provide valuable information from a supervisory perspective?

<ESMA\_QUESTION\_AAR\_18>

In our opinion we see no additional benefit of including reporting on Unique Trade Identifiers (UTIs). Therefor including such reporting would be viewed as unnecessarily burdensome, introduces duplication and additional operational complexity.

<ESMA\_QUESTION\_AAR\_18>

1. Do you agree with the proposed approach for the reporting of the operational conditions?

<ESMA\_QUESTION\_AAR\_19>

We note the reporting requirements to meet condition a of the operational conditions outlined in section 4.1. As stated in our response to question 2, we stress that:

* The written statement confirming the contractual arrangement with the authorised CCP should only be provided at the start of the reporting and updated only when the contractual arrangement changes.
* The policies and procedures are only reported at inception (or start of the reporting) and when material changes took place since the last report.
* Assigning a dedicated staff member is excessive and not practical and also not proportional to the size and complexity. It is not realistic that a single person will be responsible for all relevant business processes concerning derivatives clearing nor would this person be dedicated to this role. Additionally, responsible staff may also change frequently between reporting periods.

As noted in our response to question 2, counterparties should not be required to hold financial resources. Draft RTS Article 8 (1) (c) (i) should be amended as follows: “*the account ~~statements~~ for cash and collateral, including the number of the account* ~~and the aggregate amount of financial resources provisioned”.~~

<ESMA\_QUESTION\_AAR\_19>

1. Do you agree with the proposed approach for the reporting of the representativeness obligation?

<ESMA\_QUESTION\_AAR\_20>

It is unclear how firms should report to NCAs every 6 months on compliance with the representativeness requirements which are based on an annual average basis (draft RTS Article 9 (1)(c) refers to average over the past 12 months).

As noted in our response to questions 18 the reporting of UTIs as proposed in draft RTS Article 9(1)(e) is in our view unnecessary, while representing a reporting burden/cost.

<ESMA\_QUESTION\_AAR\_20>

1. Do you agree with the proposed approach to standardise the reporting arrangements under the active account requirement?

<ESMA\_QUESTION\_AAR\_21>

In the absence of ITS we support the proposal by ESMA to provide level 3 guidance. ESMA should publish this as early as possible in 2025 to allow parties to prepare to implement this guidance.

In addition, a technical framework for submitting the various reports to the relevant supervisory authorities need to be in place and have been tested, with sufficient lead-time for market-participants to implement the necessary changes to their systems.

<ESMA\_QUESTION\_AAR\_21>