**ISDA Executive Summary regarding ESMA consultation on the conditions of the Active Account Requirement – 27 January 2025**

**Executive Summary**

1. We have very significant concerns with the **proposed reporting requirements**, which go well beyond what is necessary to monitor compliance with the AAR and are inconsistent with the EU’s recent commitment to reduce administrative and reporting burden.
   * Most of the information required to be reported to NCAs on activity and risk exposures is already reported to EU Trade Repositories (TR) under Article 9 of EMIR and NCAs have access to the data in the EU TRs. Requiring firms to send both aggregate data and transactional data would require a significant IT build that would come at considerable costs. For counterparties that make use of delegated reporting under Article 9 of EMIR, it will be extremely burdensome to report the required information as it is quite possible such entities will not have reporting infrastructure in place. Costs will ultimately be borne by the end users/pensioners, which goes against the EU objective to build a Savings and Investments Union.
   * It is unclear why some of the information required (e.g. UTIs and IM/VM posted) is necessary to monitor the active account requirements.
     + ESMA’s own impact assessment recognizes that UTIs are not strictly necessary to assess compliance with the AAR.
     + ESMA already has access to notionals in the EU TRs and any additional VM/IM metric is unnecessary and irrelevant.
2. Some aspects of the active account **operational conditions**, in particular stress-testing, are not clear. Based on our understanding of the proposal, which is that the stress-tests will be run at EU CCP level and simulated by the EU CCP (there is no specific simulation of the clearing member’s or client’s account), and subject to the ISDA recommendations below being addressed, we do not object to the thrust of the proposal. We would, however, strongly object to any stress-test that would resemble a CCP fire drill, an exercise involving the participation of relevant EU CCPs and all market participants subject to the AAR, simultaneously running a simulation. The expense and administrative burden of such an exercise test, constructed in this way, would be disproportionate to the potential benefit. We will provide additional analysis on such approach in the coming weeks should this be what is envisaged by draft RTS Article 3.
3. Regarding the AA **representativeness requirements**, while we are concerned about the complexity resulting from the representativeness requirement and the identification of more than 3 classes in total, we welcome that the proposed PLN IRS calibration recognises that the liquidity for PLN IRS at EU CCPs is extremely limited. We also welcome the confirmation in paragraph 135 of the CP that “*subcategories in which counterparties or their group clear 0 trades during the reference period in a Tier 2 CCP should replicate 0 trade in the same subcategory at an EU CCP*”. There should be no requirement for counterparties to enter into derivative transactions solely for the purpose of meeting the 5 trades per most relevant subcategory at an EU CCP, especially in the context of the Market Abuse Directive and Regulation.

**Key recommendations:**

Please note that we have provided drafting on some (but not all) of our key recommendations in the Annex.

*Scope:*

1. We recommend further clarifications/amendments pertaining to the methodologies for calculating the EUR 6bn, EUR 100bn and 85% thresholds and the threshold under the fifth subparagraph of Article 7a (4). See our response to question 1.
2. We also suggest amending draft RTS Article 4(1) to codify how groups consolidated in the EU can meet the AAR. See our response to question 1 and drafting recommendation in the Annex.
3. The timelines and methodology for calculating the 85% threshold should be amended so that counterparties that choose to rely on such exemption are able to do so. The proposed lookback period acts as a disincentive to clear on EU CCPs as most counterparties will need some time to achieve the goal of 85% clearing at an EU CCP. See our response to question 1.

*Operational conditions:*

1. The draft RTS on the AA operational conditions should reflect the principle that operational capacity should not include the financial resources of the clearing participant. See our response to question 2 and drafting proposal in the Annex.
2. The draft RTS on operational conditions and stress-testing should put an obligation on the EU CCP to provide the required written statement to counterparties upon request, without undue delay, for free, in English if requested. As written, the obligation falls on counterparties to request this statement from the EU CCP, but there is no obligation on the CCP to provide such a statement. See our response to questions 3 and 4 and drafting proposal in the Annex.
3. We object to the requirement to appoint at least one staff member with sufficient knowledge to support the proper functioning of the clearing arrangements at all times. See our response question 3 and drafting proposal in the Annex.
4. The RTS on stress-testing should reflect the principle that it is not a fail or pass test. See our response to question 3 and drafting proposal in the Annex.

*Representativeness conditions:*

1. As noted in the September 2024 joint association letter to the EC and ESAs on EMIR 3.0 implementation timelines, counterparties should not be required to comply with the representativeness requirement until the ESMA RTS on the different classes, maturity ranges, trade size ranges and reference periods are effective. Given the Level 1 provision (Article 7a (2) (d)) pertaining to representativeness is not specific enough/self-executing, firms cannot be expected to comply with the representativeness requirement on a best effort basis upon entry into force of EMIR 3.0.
2. The concept of ‘annual average’ can be interpreted in different ways and we would welcome further clarification on how to compute annual averages. See our response to question 13.
3. Taking into account the liquidity in EUR STIR at EU CCPs, we recommend ESMA only identifies 2 maturity buckets: one below and one above 1 year. See our response to question 11.
4. We recommend the final RTS define how to measure the trade size as part of the representativeness obligation. We assume it is gross notional amount as for the other measures.

*Reporting:*

1. Firms should not be required to resend in aggregate form, and/or in the same transactional form, EMIR Article 9 data to NCAs. NCAs should extract the information already available at the EU TRs. The RTS should require firms to certify if they are above the AA thresholds (clearing threshold condition 2, EUR 6bn threshold and EUR 100bn threshold). This reflects the approach taken in the [ESMA Active Account notification template](https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.esma.europa.eu%2Fsites%2Fdefault%2Ffiles%2F2024-12%2FAAR_notification_template.xlsx&wdOrigin=BROWSELINK) published on 20 December 2024. At the request of their NCA, firms should provide further information. See our response to question 16.
2. Firms should not be required to report information on the VM and IM posted by counterparties (for both cleared and uncleared transactions) in aggregate value. VM/IM are not necessary to monitor compliance with the AAR. See our response to question 17.
3. Firms should not be required to report UTIs. UTIs are not necessary to monitor compliance with the AAR. See our response to question 18 and 20.
4. While we support the establishment of set dates for reporting, we recommend that draft RTS Article 10 specifies the six-month *calculation periods* rather than a single date *on which to report the data*, with firms given a three-month window at the end of each calculation period in which to report the data. See our response to question 21.