**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\_name of respondent.

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 | German Banking Industry Committee (Deutsche Kreditwirtschaft) |
| Activity | Banking sector |
| Are you representing an association? | ☒ |
| Country/Region | Germany |

# 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 believe that the following issues may merit further review to ensure a consistent implementation and application of the AAR by the addressees of the obligation:

* Clarifications concerning the application of AAR-exemptions under Art. 7a (5) EMIR 3.0 (85% of transactions in relevant categories already cleared via an EU-CCP) and Art. 7a (4) subpara. 2 EMIR 3.0 (notional clearing volume outstanding of less than EUR 6 billion), including regarding the interrelation between these two thresholds and the coordination of the calculation methods.
* Clarifications concerning the scope of the obligations under Art. 7a (3) (d) EMIR 3.0 (representativeness requirement) of entities falling under the exemption under Art. 7a (5) (85% threshold): Specifically, it should be considered to limit/simplify the requirements concerning the representativeness as much as possible to further incentivise the continuation and extension of clearing in the categories where the threshold has been met. A simplified approach appears to be particularly merited with regard to entities clear 85% or more of all new contracts via an EU CCP and - in the interest of proportionality - smaller entities.
* Clarifications on how to address changes to the AAR-status: The report does not address the issue of potential subsequent changes to the ARR-status, and, in particular, does not provide for an adequate transition period following such change of status.
* Clarifications regarding the possibility for clients to delegate AAR related reporting obligations with regard to client clearing in cases and to the extent the EMIR reporting obligations under Art. 9 EMIR have been delegated.
* Clarifications regarding the application of the AAR by groups under consolidated supervision, specifically the ability to report on behalf of group members.
* Clarification regarding the relation between Art. 4a EMIR 3.0 and Art. 7a of EMIR 3.0 and, specifically that calculations for the purposes of Art. 7a do not constitute a calculation for the purposes of Art. 4a EMIR 3.0.
* The general issue of the lack of a consistent transition/implementation regime with adequate phasing-in and necessary synchronisation of the start of the application of new obligations (especially the requirements under Art. 7a (3) EMIR 3.0).

However, our central concern is that the proposal on the reporting requirements and related obligations amounts to the establishment of a complex/highly detailed new AAR-specific reporting and information framework (AAR-reporting regime) in parallel to the already existing EMIR TR-reporting regime and also the general banking/market supervisory reviews.

A new, parallel AAR reporting regime will not only be partly duplicative (with the risk of producing inconsistencies) but also extremely burdensome for all market participants. It would therefore effectively constitute a further and significant competitive disadvantage for them in the international financial markets.

We believe that a better, equally effective and simpler solution would be an approach which relies primarily on data available under the existing EMIR-TR-reporting regime, and statements/confirmations and as well as data directly provided by the EU-CCPs (including a regular confirmation by the addressees of the AAR on their implementation AAR). We realise that certain elements of the reporting regime are rooted in the EMIR level 1 text. However, we believe that the EMIR level 1 text should be applied and interpreted with a view to avoid unnecessary burdens for market participants as far as possible.

For more detail, see our response to Q 16.

<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>

While we largely agree with the key elements identified in the report to demonstrate functionality, we strongly believe that the processes suggested to demonstrate compliance with the conditions can and should be significantly simplified in order to avoid unnecessary, duplicative and burdensome new documentation and information requirements (see already our response to Q1 above as well also to Q16 below).

The report identifies the following as key components for demonstrating the requisite functionality: The establishment of IT-connectivity, the conclusion of the legal arrangements and the establishment of adequate internal processes and policies to maintain and operate the accounts established in view of the AAR.

While these are relevant components of a functional clearing account, it should be recognised that most of these elements are a necessary prerequisite for the establishment of a clearing account with a CCP. Consequently, the existence of the clearing account already demonstrates that these elements are in place.

Where parties clear the relevant types of transactions/products on a regular basis with an EU-CCP, the requisite functionality of clearing account, including IT-connectivity and collateral arrangements etc.) is thus already objectively and comprehensively demonstrated by this fact. The existence of the accounts and their use can also be verified (and constantly reviewed) via EMIR TR-reports as well as the CCP-statements/confirmations proposed in Section 4.2 item 68 of the Report/ Art. 2 (1) (c) and 3 (1) (c) of the draft RTS.

The internal arrangements of an institution in respect of the AAR and their adequacy will also be subject to regular supervisory reviews concerning compliance with EMIR by the competent supervisory authorities.

Against this background, we believe that there is no need to introduce a special reporting regime (especially one requiring additional documentary proof and introducing an additional reporting cycle in parallel to the already existing EMIR reporting regime).

<ESMA\_QUESTION\_AAR\_02>

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

<ESMA\_QUESTION\_AAR\_03>

As in the case of the conditions a) we recognise that the report identifies many relevant elements but - for the reasons already stated in our responses above - we see no need to introduce a new reporting regime.

In addition, we believe that the proposal also includes unnecessary formalities:

a) Systems and resources/dedicated staff - item 62 and 66 of the Report/ Art. 2 (1) (b) of the draft RTS):

The requirement to dedicate adequate resources and personnel does not need to be subject to formalistic/rigid demands, especially not in the form of specific minimum numbers of dedicated staff: The internal operational set-up will necessarily depend on the specifics of the institutions and its general operational set-up and business model. The operational set-up of an institution is already subject to regular supervisory review and therefore does not require additional/separate rules and information/reporting requirements.

Of course, institutions should, upon request, be able to name contacts and describe the set-up of the teams covering the clearing accounts.

b) Operational capacity/demonstration of capability to address large flows and increase of volume: threefold /85% increase - item 67 and 82 of the Report) Art 2 (1) (c) and Art. 3 (1) (c) of the draft RTS):

The proposed requirements regarding the operational capacities of the active account appear to be based on the assumption that the entirety of positions held may need to be transferred to an EU-CCP. However, 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 as a whole. Rather, they would be terminated and only a subset thereof would then be re-stablished in the form of new transactions (only partially mirroring the former positions held at the non-EU CCP) with an EU-CCP.

This subset of mirroring positions would be limited to positions/transactions where a re-establishment is necessary, commercially reasonable and practically feasible.

Thus, the subset of transferred positions will constitute only a small portion of the positions originally held with the non-EU CCP. The increase of the volume following such an event will therefore, in all likelihood, significantly lower than assumed.

Consequently, the assumption of a threefold increase (item 70 of the report/art. 2 (1) 8 (c) of the draft RTS) as well as the assumption of an 85% increase of the new clearing activity for stress-testing the purposes (item 82 of the Report and Art. 3 (1) (c) of the draft RTS should be reconsidered (see also response to Q4).

A more realistic and practical approach would be the focus on one, significantly lower value (e.g. a two-fold increase or a volume increase of 50%)

c) CCP-statements/confirmations: Formal requirements (signed/written) and corresponding obligation for CCPs – Section 4.2 item 69 and 76 of the Report / Art. 2 (1) (c) and Art 3 (1) (c), (4) and (5) of the draft RTS:

CCP-statements/confirmations (upon request of the competent supervisory authority) can be an important element in order to ascertain the functionality of clearing accounts. However, there is no need to prescribe a specific formal “signed” / “written” confirmation (as this may imply the need for paper/original documents or even handwritten signatures and could exclude other suitable formats (such as electronic formats)). The competent supervisory authorities will, in any event, be able verify the authenticity of a statement/confirmation.

In addition, in order to ensure that clearing members and/or clients are able to obtain these CCP-statements/confirmations (upon request of the competent supervisory authorities) CCPs would – correspondingly - need to be subject to a formal obligation to issue such statement/confirmation with the required set of information and in the required format and without cost.

<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>

We believe that the proposed approach on annual stress-testing should be reconsidered:

We recognise that the proposal reflects the requirements under Art. 7a (4) sub-para 4 EMIR 3.0 calling for annual stress-testing. However, we believe that the proposal in its current form is overly burdensome:

Stress-testing exercises are always very challenging and burdensome for the affected institutions. Against this background, the proposed annual stress testing-cycle (let-alone a 6-month cycle) is very aggressive.

Moreover, CCPs already conduct their own regular and complex stress-tests (“fire-drills” - however, usually with longer intervals).

Separate, additional – annual– stress-testing exercises for AAR-purposes – especially if including the participation of clients - would therefore be extremely challenging for all affected parties and significantly impact their day-to-day business operations.

The burdens imposed by the stress-testing requirement thus need to be minimised as much as possible. To this end the following could be considered:

1. Strict limitation of the scope of the stress-tests to the functionality of the active-accounts with a primary focus on the CCP and the clearing members
2. Differentiation between stress testing on CCP/clearing member level on the one hand and clients on the other.
3. For CCPs and clearing members: Integration and synchronisation of the AAR-stress tests with CCP stress testing exercises and cycles and a primary focus on CCP-statements/confirmations.
4. For clients: Adoption of a simplified approach focusing on the basic functionality of the accounts and relying on statements/confirmations (which may be delegated to/provided by the relevant clearing member(s)).
5. Frequency, scope and depth of the stress-test: Providing for two separate test cycles in the form of an annual general/simplified test and more comprehensive tests at longer intervals. With a view to ensuring proportionality, the scope and depth of the tests could - in both cycles – be further adjusted/simplified according to the status/type of the involved entities.

As to the proposed simulation of an 85% increase of clearing activities, for the reasons already stated in our response to Q3, we believe that tests should apply lower values.

The comments in our response to Q 3 regarding unnecessarily rigid format requirements and the need to impose corresponding obligations on CCP to issue statements/confirmations apply correspondingly to the requirements concerning the format of the statements/confirmations mentioned in Art. 3 (4) and (5) of the draft RTS (need for “written” documents).

<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>

As already indicated in our response to Q4, we believe that an annual stress-testing cycle (let-alone a six-month cycle) is already very challenging, and that AAR-stress testing should therefore be limited to one test per year required under the level 1 text.

<ESMA\_QUESTION\_AAR\_05>

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

<ESMA\_QUESTION\_AAR\_06>

We generally agree with proposed division of classes in Annex I Table 1 to 3 for cleared EUR interest rate derivatives transactions, however, it should be considered to further reduce the overall complexity and burdens for market participants by eliminating one or two sub-categories. This would not affect the overall effectiveness of the AAR but greatly reduce the operational burdens.

<ESMA\_QUESTION\_AAR\_06>

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

<ESMA\_QUESTION\_AAR\_07>

We agree with the proposed approach to cleared PLN interest rate derivatives transactions as set out in Annex Table 4 and 5 as this approach reflects the fact that the liquidity of the market in PLN OTC IRD is very likely to remain very limited and that there is clear risk that the extension of the AAR to these transactions/products can have unintended negative consequences for European market participants.

<ESMA\_QUESTION\_AAR\_07>

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

<ESMA\_QUESTION\_AAR\_08>

We also generally agree with the proposed approach to cleared EUR STIRs set out in Annex I Table 6 to 8 as this approach again reflects the fact that the limited liquidity in this market.

<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>

Generally: Yes – see our response to Q6 (room for further reduction of complexity).

<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>

See our response to Q7.

<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>

We believe that the complexity could be further reduced by limiting the number of maturity-ranges for Euribor-STIR and €STR-STIR in each case from currently four down to two.

<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>

In view of our response to Q 11 (further complexity reduction by limiting the number of maturity-ranges for Euribor-STIR and €STR-STIR from four to two) we do not see a need for further granularity:

A more granular approach would significantly increase the complexities and could cause unintended consequences (e.g. the need to enter into transactions in a subcategory where there is little liquidity and where it may be difficult to identify a sufficient number of suitable commercially induced transactions (which then may cause the need to enter into transactions without commercial basis (pro-forma transactions)).

The impact of the AAR may also change market behaviour and could affect the current distribution of liquidity across the subcategories.

<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>

While we generally agree with the proposed reference periods, we believe that the interaction between the observation period under Art. 7a (4) subpara. 5 EMIR 3.0 (annual/ preceding 12 months) on the one hand and the 1-month (and also the 6-monh) reference period proposed under Art. 4 (3) of the draft RTS on the other may need to be reviewed or clarified: These two separate, unsynchronised observation cycles may cause practical challenges to market participants since the composition of portfolios to be observed on a monthly basis may significantly vary during the 12 months observation period prescribed by Art. 7a (4) subpara. 5 EMIR 3.0. We believe that the 12-month observation period is the more relevant one of those two and a focus on this period would significantly facilitate reporting for market participants and would also be helpful for the supervisory authorities reviewing the data.

<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>

We agree with the approach to PLN OTC IRD, and, in particular, do not see a need for more granularity.

<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>

We largely agree with the proposal. However, it should be taken into consideration that the EUR-Euribor STIR market at EUREX is less liquid than the €STR-market. This could best be addressed by aligning the reference periods in both cases to 6 and 12 months and limiting the number of maturity ranges (see our response to Q12).

<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>

No: As already indicated in our response to Q1 and 2, we strongly believe that all reporting requirements under Art. 7 to 10 of the draft RTS establishing a completely new detailed and complex reporting regime in parallel to the already existing EMIR-reporting regime should be reconsidered.

A simpler yet equally effective approach would be a system based the following elements:

1. Regular (annual) statements/reports by the addressees of the AAR obligations on their status and implementation of the AAR.
2. CCP-statements/confirmations on the functionality of the accounts held with the CCP (as envisaged in Art. 2 (1) (c) and Art. 3 (1) (c) of the draft RTS).
3. EMIR TR-reports (allowing competent supervisory authorities to verify/review the clearing activities of the market participants at any time).
4. Regular reviews of the competent supervisory authorities of the implementation of the AAR (as a part of the general supervisory reviews).

Should a new separate reporting framework be established despite the concerns raised against such new parallel reporting framework, it should at the least be simplified as much as possible.

This should include the following:

* Reduction of granularity ad degree of detail: Reporting details should at least be limited to information which cannot be obtained from EMIR TR-reports or other existing regulatory reports or CCP-statements/confirmations. Reporting should especially not cover margin activity/collateral (see also our response to Q17).
* Significant extension of the reporting intervals: The currently proposed intervals of six months (based on Art. 7b (1) EMIR 3.0) are to short and may already tax the ability of the supervisory authorities to fully analyse the information and where required, clarify the situation. These intervals should be extended to at least two years.
* Sufficient lead-time for any new reporting framework: The implementation of the operational and technical framework for a new reporting regime will take time: All effected parties would therefore need sufficient lead-time to implement the necessary changes.

In addition, we note that the draft RTS proposes to require the reporting of data which is not directly related to the AAR and thus not necessary, in particular data concerning:

* initial and variation margin – Art. 7 (1) of the draft RTS/Annex II Table 2
* client clearing services – Art. 7 (1) of the draft RTS/Annex II Table 3.

<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>

No. As already mentioned in our response to Q16, we believe that the reporting of margin activity related information on a continuous basis should not be required and will not provide helpful information since the margins posted are portfolio related.

<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>

No. Transaction related information can, in any event, be obtained from TR-reports.

<ESMA\_QUESTION\_AAR\_18>

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

<ESMA\_QUESTION\_AAR\_19>

As already addressed in our responses to Q1 and Q16 above we do not see a need for reporting on the operational conditions, especially not with the proposed level of detail. In particular, we do not see any need for reporting information on margin activity and the collateralisation set-up or any other transaction related information which can be obtained from TR- reports.

We further refer to our comments in our response to Q2 regarding the fact that the functionality and activeness of a clearing account is conclusively demonstrated via the TR-reports and the CCP-statements/confirmations.

<ESMA\_QUESTION\_AAR\_19>

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

<ESMA\_QUESTION\_AAR\_20>

See our responses to Q16 and Q19.

<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>

As to our general concerns regarding the establishment of an additional, comprehensive AAR-reporting regime in parallel to the already existing EMIR reporting framework, see our responses to Q1, Q16, Q19.

If and to the extent a new/parallel AAR reporting flow is to be established, we believe that the formats should indeed be standardised by means of ESMA guidelines in the interest of consistency and efficiency.

Reporting (to the extent required) can and should only commence when these standards/ are set and subject to a sufficiently long preparatory implementation phase in advance of the start date. The addressees of the AAR obligations and any related reporting requirements should, in particular, not be expected to establish any preliminary individual reporting processes which then shortly thereafter would have to be replaced by / adapted to the ESMA standards.

As to the reporting dates and related details, we believe that the following should be considered:

* The reporting dates for the semi-annual reports should be as flexible as possible. In particular, it should be ensured that these do not fall on or are too close to bank holidays. This could be resolved by providing for reporting windows instead of setting specific dates.
* The period between the reporting date and end of the reference period the report relates to has to be long enough to allow the processing of the required data.
* The reporting window (or dates) and relevant reference periods should be aligned with the relevant calculation periods under the draft RTS and EMIR 3.0.
* The scope of semi-annual reports should be limited to the relevant preceding 6-month reference period.

<ESMA\_QUESTION\_AAR\_21>