**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 | Italian Banking Association |
| Activity | Banking sector |
| Are you representing an association? |  |
| Country/Region | Italy |

# 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>

On the basis of our analysis, we believe that ESMA should consider providing for some clarifications on the scope of AAR (Active Account Requirement) with **specific regards to Entities-vs-Groups scenarios**. We do believe that the relevant paragraphs 33-42 of the consultation paper (CP) do provide important information and a first set of clarification to interested parties, but those indications should ideally find a place within the Recitals and/or the Articles of the forthcoming Commission Delegated Regulation. We are aware, though, that the scope of the Commission’s legal mandate to ESMA is limited in scope to (as described under At.7a(8)) the (operational) requirements under Par.3, point (a),(b),(c) of Article 7a, the stress testing conditions and the relevant reporting. However, waiting for a Level-3 text/Guideline to provide those information and clarification (as such legal text would likely come later in time across 2025/2026) would reveal not compatible with the immediate AAR formal clarifications and applicative needs of parties subject to AAR.

All in all, considering the Entity-vs-Group-Level profiles already addressed under paragraphs 33-42 of the CP and those we collected by our members, we would greatly appreciate if ESMA could **formalise** the main messages already conveyed under par. 33-42 within the forthcoming annexed draft RTS. However, we believe ESMA should also amend the proposed draft RTS to provide details and clarifications (and formalise them accordingly) on the following:

1. If on the one hand the legal text of Regulation 2024/2987 is clear under Art.7a(2) when it states that “(..) *a counterparty belonging to a group subject to consolidated supervision in the Union shall consider all derivative contracts referred to in par.6 that are cleared by that counterparty or by other entities within the group to which that counterparty belongs with the exception of intragroup transactions* (..)”, on the other hand we believe that similarly clear statements (i.e. clarification) should be provided with regard to how such single counterparty should fulfill the representativeness requirement and parameters in the specific case it belongs to a group subject to consolidated supervision in the Union. Cross-reading of Regulation 2024/2987, the CP and the Draft RTS do not seem to provide for clarification on this;
2. Whether the provision to activate a clearing account is applicable also to those financial entities of a (consolidated) Group where said Group exceeds the clearing thresholds in any of the categories of derivative but the single financial entities do not operate in derivatives contracts subject to the Active Account (i.e. IRS in Euro or Polish Zloty, and STIR in Euro);
3. Whether a financial entity operating in the relevant derivative contracts, just mentioned above, only with another financial entity of the same consolidated Group (the latter of which has not asked for legitimate business reasons for an intragroup exemption to its NCA) is subject to the requirement of activating a clearing account, or might it be sufficient (to comply with Art.7a(1)(2)) that the other party (belonging to the same Group) has opened a clearing account complying to Art.7a, as we would hope for by the combined reading of CP’s paragraph 40;
4. how it could be possible to address any forthcoming change to the “AAR-status” of a financial entity. Regulation 2024/2987 and the CP do not address the issue of such potential changes in the future and, in particular, do not provide indications on the desirable necessary transition period which would have to follow such changes in status.

In addition to the above, **we believe that ESMA** – in detailing the AAR, and specifically the representativeness obligation – **should address a very specific (but widely spread) scenario**, i.e. the one of a Client, which clears Relevant Trades at a given EU CCP (e.g. EUREX) via different clearing members. In such business scenario, the Client does have multiple clearing (and active) accounts at the same EU CCP. On the basis of our analysis, we believe such client should be allowed to use all those accounts to satisfy the ARR, considering that such accounts are all opened at the same EU CCP. Hence, in order to meet the representativeness requirement(s), in this business scenario a client should be allowed to aggregate and count the transactions cleared at such CCP thanks to all these accounts therein opened/active.

The business scenario mentioned above is common and very much used in the client clearing panorama. Thanks to our members, we understand that it is justified by the fact that a client uses different CMs (to access the same CCP) in order to diversify the (counterparty and credit) risk, as well as to manage the operational and financial limits imposed by each CM on the related clearing account and activity.

Should ESMA not take into consideration the above to amend the draft RTS, such clients would end up withstanding an objectively excessive burden by keeping multiple clearing accounts open via more CMs at the same CCP, and this would most likely end up forcing them i) to elect just one of their accounts as “Active Account” and ii) to concentrate in such single account the entire clearing activity run at that specific EU CCP. Thus, bearing the risk of a) losing the benefits of diversification among CMs; and b) having difficulties in complying with the representativeness obligation on each single account, in consideration of the current limit(s) on such account imposed by the CM(s).

<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>

On the one hand we agree with ESMA’s approach to the “operational” condition (a) of the active account (i.e. demonstrating, on a regular basis, that the account is “*permanently functional, including with legal documentation, IT connectivity and internal processes associated to the account being in place*”). On the other hand, though, we believe that this specific condition concerns some technical aspects of an active account that might be administratively excessive to be demonstrated and reported every six months (as indicated under Art.7b). As Regulation 2024/2987 is in force though, perhaps ESMA might work with NCAs to find more straight-forward ways (for legal entities subject to this provision), to remotely confirm (rather than having to transmit) and demonstrate their compliance, compared to current set-out which implies “reporting”, every 6 months, documentation and other information which be basically reiterated for each active account. So, by “reporting”, in light of the peculiar administrative onus, ESMA might consider asking stakeholders to “remotely confirm” every six months their compliance, based on the documentation digitally and completely reported at the very beginning of this new provision’s application.

We appreciate ESMA’s acknowledgements under par.60 of the CP, where it states that “*(..) legal and technical requirements (..) are already required by CCPs as part of their onboarding (…). ESMA understands that similar checks are conducted by clearing members when onboarding clients(..)*” but as we argue in our proposal in the paragraph above we fear that ESMA may underestimate the actual administrative onus on entities subject to confirming – every 6 months – such basic and fundamental conditions for operating a clearing account.

Besides, we know that ESMA is aware of the fact that the set-up and activation per se of i) clearing accounts and ii) client-clearing accounts with a CCP do necessarily demonstrate the i) existence of operational accounts, ii) IT-connectivity, iii) collateralisation set-up (which is a fundamental component of any clearing account) and iv) the presence of internal processes and policies for all the clearing activities of the institution (including client clearing and the relevant client clearing arrangements).

Also, we believe that simplest and most direct option to demonstrate the establishment of such functional accounts would be the certificate of the CCP which is proposed under Section 4.2 par. 68 (which corresponds to the Draft RTS’s Art. 2(1)(c) and Art.3(1)(c). This CCP-certifications – regarding the capabilities of the account – would also necessarily confirm the existence of fully functional clearing accounts. Further to this, a confirmation of the existence of operational clearing account always confirms, as well, the establishment of collateral and cash accounts, since clearing accounts always and necessarily include the set-up for collateralisation in accordance with rules and regulations of the CCP.

Eventually, Art. 1 of the draft RTS states and details down (under **letters a), b)** and **d)**) the three AAC operational conditions stated in the level-1 Regulation under Art.7a(3), Letter a), which in brief are about *legal docs, connectivity, and internal processes*. Hence, we found it **inconsistent** with level-1 Regulation and unexpected that the RTS’ Art.1, under **letter c)** adds in this scope the provision to establish «*cash and collateral accounts, with sufficient financial resources to meet the obligations arising from the direct or indirect participation in an authorised CCP*» which is not related to the level-1 provision under Art.7a(3), Lett.(a) (where indeed the possession of sufficient financial resources is not mentioned), nor covered by the relevant legal mandate under Art.7a(8). Supporting our views, we found that ESMA, under para. 67 on page 16, remarks that “operational capacity” should not include the financial resources of the clearing participant.

<ESMA\_QUESTION\_AAR\_02>

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

<ESMA\_QUESTION\_AAR\_03>

In the same manner as for the “approach for condition (a)” (previous question), we believe that even for conditions (b) and (c) ESMA’s approach should be that of minimising the additional administrative onus implied by EMIR 3.0.

As it regards the operational condition (b)of Active Account’s Level-1 requirements (i.e. “*counterparty has systems and resources available to be operationally able to use the account, even at short notice, for large volumes of the derivative contracts referred to in paragraph 6 of this Article at all times and to be able to receive, in a short period of time, a large flow of transactions from positions held in a clearing service of substantial systemic importance pursuant to Article 25(2c)*”),

* as far as it concerns the draft RTS’ Art.2(1) **(a)**, stating that counterparties shall “*set up internal systems to monitor the counterparty’s exposures and the internal arrangements to support a large flow of transactions from positions held in a clearing service of substantial systemic importance pursuant to Article 25(2c) under different scenarios assessing any potential legal and operational barriers to this effect*”, we set forth the proposal to remove the ending reference to the “*potential legal and operational barriers*”. Indeed, given that this part of the EMIR 3 Regulation and the related draft RTS’ article attain (in brief) the capability of using the account for very large volumes of contracts, at short notice and across a reference period of a single month, it basically regards the very rare but possible scenario of a clearing migration/relocation from Tier2-CCPs to Union CCPs. If so, in such a business scenario, and in such a short time, we argue that it would not be plausible to assess “*any potential* ***legal*** *barriers*”. In other words, it is not clear which are the legal aspects the counterparties should need to take into account to provide such assessment. This uncertainty, coupled with the complexities underlying such legal analysis, could predictably lead counterparties to outsource such an assessment to external counsels, bearing the relevant related costs. Even more so in the case of smaller counterparties, which notably cannot rely on legal offices with a multi-jurisdictional reach and/or specialized competences in clearing matters. Hence, such draft provision referring to “*any potential legal barriers*” under Art.2(1) (a) would turn out in extra-costs, especially for those parties which are usually less structured and prepared to bear them;
* regarding the corresponding provision under draft RTS’ Art.2(1), letter **(b)**, and specifically the proposed provision to “*appoint* ***at least one staff member*** *with sufficient knowledge to support the proper functioning of the clearing arrangements* ***at all times***”, our considerations are the following:
  + “appointing” a specific staff member might appear “easy to frame in a legislative text”, but less immediate to implement, **especially when it comes to medium and small financial counterparties** which tend to leverage the relationship with their relevant clearing member. Further to this, such specific indication of “a staff member” might reveal drawbacks in terms of the flexibility that instead a technical legislative provision should offer (see further ahead in our comment). Also, under the current wording, having “*sufficient knowledge to support the proper functioning of the clearing arrangements*” equals, *de facto,* having high skilled competence which in turn requires long-time training and dedication to be acquired, and is very-CCP-specific (given that a number of menus, commands, formats, etc, despite similarities, do differ across CCPs). Such “*sufficient knowledge*”, though, is clearly already in place at the business unit(s) of Clearing Members, and at those of (bigger) “clients providing access to clearing” to other entities, but usually such knowledge is “spread across” the relevant business unit (or some resources of such unit), so that more undefined unit’s resources might intervene in case of need. **In brief, on the basis of our analysis**, and with specific consideration of medium and smaller financial entities subject to such provision(s), **we believe that** the Art.2(1), letter(b) should be revised (for instance) as it follows “(…) *appoint at least one ~~staff member~~ point of contact ~~with sufficient knowledge to support the proper~~ for the functioning of the clearing arrangements(…)*”. This outset would allow financial counterparties to provide either a specific resource or a team-based email address and phone contact, increasing the safeguards for an immediate prompt response in case of need;
  + as it regards the time frame mentioned above (“***..at all times..***”), we believe that it would be important that ESMA clarifies whether the point of contact would be expected to be available at all different timeframes / time zones a financial institution is involved with clearing activity (i.e. all-around-the-clock when based in the EU, or one resource per third-country in case of larger FCs with subsidiaries in Asia and US);
* we appreciate that the **draft RTS** states under Art.2(1), letter **(c)** that counterparties shall “(..) *obtain from the authorised CCP, directly or indirectly via a clearing member or a client providing client clearing services, a signed written statement confirming that the account of the counterparty has the operational capacity to clear up to three times the notional outstanding cleared for the previous 12 months in the derivative contracts (..)*”. However, we believe that:
  + Letter (c) under draft RTS Art.2 should slightly by rephrased in a way that it will not be on the counterparties to request and obtain such statement, but on the EU CCPs to automatically produce it and release such statement, both for clearing accounts currently in use, and for those accounts which will be activated in future. This could be done swiftly by the following amendment: “*(…) the counterparties shall: a)… b)… c) ~~obtain~~ receive from the authorised CCP, directly and indirectly via a clearing member (…)” possibly stressing our proposal by adding (at the end of Letter (c)) the following period “Authorised CCP shall produce such statement and transmit to the relevant counterparty once the clearing account is active and ready to operate”;*
  + should ESMA take into account our proposals above, **we also suggest to align to it the “corresponding” draft RTS text of Article 3(1)(c)** by amending it as it follows: “*~~request~~ receive from the authorised CCP, directly or indirectly via a clearing member or a client providing client clearing services, an electronically signed ~~written~~ statement that the account of the counterparty has the capacity to withstand (…)*”
  + requiring such statement by the CCP to be “*signed*” and “*written”* – despite these attributes do appear to represent a safeguard for financial (FC) and non-financial entities (NFC) receiving it – might bear potential drawbacks in future, in any peculiar business or market conditions which could prevent the circulation and exchange of physical paper-copy “*signed written*” documents. So, we would suggest rephrasing it in a way that would not alter the requirement per sè but could take stock of our proposal (for instance) as it follows:”(…) *an electronically signed ~~written~~ statement…*”.

Further to this, we note that ESMA’s CP and draft RTS do not provide information on the possible consequences for CCPs **failing** i) to provide such statement or ii) failing to provide it in a timely manner, unlike done for the stress-testing requirements where it is explicitly stated that the test is not “a pass or fail assessment”. We believe the draft level-2 legislation should be complemented by specifying what would be the responsibilities on / penalties for CCPs delaying, or not releasing at all, such statement(s). We believe this would also appropriately incentivise CCP to quickly provide such statement(s) and make clear their responsibilities in case of delays or fails, even more so where ESMA would accept our proposal above to amend the text of RTS in a way that CCP would have to produce and release such statement automatically after having activated a clearing account, without awaiting any specific request from a clearing member (CM) or from the client of a CM.

<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>

Further to our amendment proposals set out in the answer to Q3, pertaining “*stress-testing of operational conditions*” counterparties are required to run on available systems and resources and on the account held at the EU CCP, we understand that counterparties should request EU CCP a written statement that their account has the capacity to withstand a substantial increase in outstanding and new clearing activity of up to 85% - within two or five business days depending of the types of derivatives - of the total outstanding of their clearing activity in the derivative categories mentioned in the Level 1 text (on both the house and client accounts).

On the basis of our members’ analysis and discussions, **we are of the opinion that the 85% increase threshold proposed by ESMA should be reconsidered**, as it reasonably appears unlikely, if not unrealistic. Such a high percentage has led some stakeholders to presume that stress-testing would actually be calibrated in a way to be ready for a future massive derivative contract relocation call. Regardless the likelihood of such a scenario in the short or medium term, if EU counterparties were no longer able to clear via a Tier2-CCP, nor to maintain their already existing position(s) at such CCPs, these positions, technically, would not be transferred. Rather, they would first undergo a portfolio compression, then be terminated (by way of a close-out, including collateral) and only a subset of these positions would be re-opened in the form of new transactions at an EU-CCP (partially mirroring the positions previously held at the Tier2-CCP). This new mirrored-position(s) would therefore constitute only a smaller portion of the original positions previously held with the non-EU CCP. The increase of the volume at the EU CCP following such an event would therefore be (in all likelihood) not as high as assumed by the draft RTS.

Further to this, as it regards to Art.3(1)(b), we believe that it would be appreciated if ESMA clarified how the “clearing activity” shall be measured when the draft RTS states “(..) *increase in outstanding and news clearing activity of up to 85% of the total outstanding clearing activity (…) in the derivative contracts referred to in Article 7a(6)* (…)”.

Finally, the methodology to compute the EUR 100bn threshold is not clear at a closer reading. Same would stand for the EUR 6bn threshold (parr. 48-52). So, clarifications by ESMA would be welcomed.

<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 it regards differentiated frequency for the stress-testing depending on the counterparties’ clearing activities, we understand that ESMA proposes the stress-testing should take place yearly for counterparties with an outstanding notional clearing volume smaller than Eur 100 billion, and every six months for parties with an outstanding notional clearing volume larger than Eur 100 bn.

We have not gathered from our members specific considerations suggesting other ways to take into account the proportionality principles, despite we fear that requiring a stress test to be run every six months (understandable on a theoretical basis) might actually reveal extremely onerous, in terms of human resources and time.

Aside from this, ESMA should pay attention to any risk born by the eventual “synchronization” of such stress-test performance across the Union industry participants, as we would not want to have the many actors bearing such test all at the same time across the Union.

<ESMA\_QUESTION\_AAR\_05>

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

<ESMA\_QUESTION\_AAR\_06>

We appreciate the reasoned content presented by ESMA under paragraphs 93-to-110. However, ESMA Assessment report under Article 25(2c) of EMIR[[1]](#footnote-2) identified three clearing services as being of substantial systemic importance to the EU. Indeed, ESMA stated that "(..) *the assessment identified three clearing services as being of substantial systemic importance to the EU or to one or more of its Members States. These are SwapClear of LCH Ltd for the clearing of interest rate derivatives denominated in euro and Polish zloty, as well as the Credit Default Swaps service (CDS) and the Short-Term Interest Rate Derivatives Service (STIR) of ICE Clear Europe, Ltd, in both cases for euro denominated products*".

The key point to highlight is that LCH SwapClear does represent one single clearing service, covering both OTC IRD denominated in EUR and OTC IRD denominated in Polish zloty. This interpretation is also the one we noted under paragraph 12 of the CP and in Recital 11 of EMIR 3.0.

The three clearing services mentioned above are:

1. IRD in Euro and Polish Zloty at SwapClear;
2. CDS; and
3. STIRs at ICE Clear Europe (with CDS no longer in scope currently due to the ICEU ceasing to clear CDS at the end of October 2023).

Further to this, Recital 14 of EMIR 3.0 states "*To define the minimum number of derivative contracts that should be cleared through the active accounts, ESMA should identify up to three derivative classes amongst the derivative contracts belonging to the clearing services of substantial systemic importance.*"

Based on what above, the approach we expected should be to consider up to three classes per clearing service with LCH SwapClear representing one clearing service for that purpose.

In conclusion, **the final outcome of such reasoning**, which we believe is in line with the wording of the provisions cited above, **would be to identify up to three classes across LCH SwapClear for both EUR and Polish Zloty.** This would be different than what proposed in the CP where there is a total of 5 classes of contracts: 3 identified for EUR IRD and 2 for PLN IRD.

Further to this, thanks to the analysis with our members, we consider it appropriate to use this question to share a few concerns regarding:

* the lack of market making exemption in EMIR 3.0, especially for less liquid instruments
* the fact that a number of regional banks and clients can only put in place transactions for hedging purposes. As an unintended consequence, the representativeness requirement could force to generate transaction for trading purposes, breaching the relevant banks/trading desk mandate.

Eventually, with regards to paragraphs 90, 91, 92, we believe that it is not clear whether the parameter of “5 operations” (or “1 operation”) has to be referred to the “stock” of operations (i.e. to the total of operations being cleared at the Active Account during the reference period) or just to the NEW trades sent to clearing during the reference period (hence, without taking into account the trades sent to clearing during the preceding periods and still outstanding/existing at the time of this trades/operation count computation).

<ESMA\_QUESTION\_AAR\_06>

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

<ESMA\_QUESTION\_AAR\_07>

Similarly to what stated in our answer to Q6, we invite ESMA to consider what stated in our response to Q6 (precisely, at the 6th paragraph).

<ESMA\_QUESTION\_AAR\_07>

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

<ESMA\_QUESTION\_AAR\_08>

We have no considerations against the proposed classes of derivatives for EUR-denominated Short-Term Interest Rate derivatives.

However, we believe that there is a risk (specific to EUR STIRs) that counterparties might have to enter into transactions for the sole purpose of meeting the “representativeness obligation” despite the absence of any commercial need/purpose for such transaction. This would occur because of the very low liquidity at EU CCPs in EUR STIRs with the overall size of the STIR market smaller than the IRS 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>

On the basis of the analysis run with our members, we agree with the proposed maturity and trade size ranges for each class of derivatives in EUR OTC IRD.

However, we would welcome a clarification by ESMA about the ways to measure the trade size as part of the representativeness obligation. Our assumption is that the trade size shall be measured in terms of “gross notional amount”, in line with the indications provided by ESMA throughout the consultation paper. We would greatly appreciate a confirmation on this.

<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>

On the basis of the analysis run with our members, we agree with the proposed maturity and trade size ranges for each class of derivatives in PLN OTC IRD.

<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>

The lower volumes, smaller sizes and consequently more limited liquidity of this contracts let us suggest ESMA to consider reducing the number of maturity ranges (presented on page 29) to two or maximum three buckets.

<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>

We understand that ESMA proposes selecting:

* 5 most relevant subcategories for each of the 3 identified classes of EUR OTC IRD,
* 1 most relevant subcategory for each of the 2 selected classes of PLN IRD, and
* 4 most relevant subcategories for each of the 2 selected classes of EUR STIR.

This proposal is based on criteria such as the trading activity of EU market operators, the size and liquidity of the respective markets, and the current distribution of activity between EU CCPs and Tier 2 CCPs.

On the basis of our members’ analysis, we confirm not to have specific considerations on ESMA’s subcategories proposal above.

However, with regards to the **Active Account and the relevant derivative contracts on which a counterparty has no activity** at the “clearing services of substantial systemic importance” (i.e. Tier2-CCP), on the one hand we deem it crucial that ESMA provided the clarification on par.135 that such counterparty does not have to clear in the EU any contracts on which is not active at a Tier2-CCP; on the other hand, though, we would urge ESMA to note that draft RTS’ Articles 4(1), 5(1), 6(1) do not provide the very same clarity on this important aspect. Hence, we would suggest amending Article 4(1) as it follows in red-coloured text: “*Counterparties subject to the obligation set out in Article 7a(1) of Regulation (EU) No 648/2012, and clearing interest rate OTC derivatives in euro at a clearing service of substantial systemic importance of a Tier2-CCP, shall clear at a Union CCP at least the required minimum number of trades as set forth in the fifth subparagraph of Article 7a(4) in Regulation (EU) 648/2012 in each of the five most relevant subcategories at an authorised CCP for each class of derivatives in euro set out in Annex I of Commission Delegated Regulation (EU) 2015/2205. Where a counterparty has no clearing activity in place at a clearing service of substantial systemic importance at a Tier2-CCP, such counterparty has no obligations in place to clear any representative derivatives contracts, of such class/subcategory, at the active clearing account opened at a Union CCP.”*

The same amendment as described above would have to be replicated under draft RTS’ Art.5(1) and Art.6(1).

<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>

We agree with the proposed reference period of one month for EUR OTC IRD for counterparties with an outstanding notional clearing volume larger than Euro 100 bn, and with the reference period of 6 months for parties with such outstanding volume between 6 and 100 Euro Bn, as these are consistent with the minimum timeframe mentioned in Level-1 Regulation.

<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>

As for our answer to the preceding Q13, we agree with the reference period (RP) proposed by ESMA for PLN OTC IRD, as in line with the text of Regulation.

<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 would suggest ESMA to set to “6 months” the RP of EUR STIR referencing Euribor, aligning it to the RP for EUR STIR referencing €STR, in light of the smaller liquidity and market size of EUR STIR referencing Euribor.

<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>

On the basis of our members’ analysis, we believe that ESMA should consider reviewing the overall approach suggested for the “*reporting of the activity and risk exposures of the counterparty subject to the active account*” (as described under the draft RTS’ Articles 7 to 10, annexed to the CP) as it appears objectively too complex and granular when compared to the approach that would be expected by the reading of level-1 legislation, on the basis of which such reporting should instead focus on the essential information that is not yet available or easily accessible to supervisory authorities.

Such re-consideration of ESMA’s RTS proposal is even more necessary when assessed in combination with another requirement, i.e. the level-1 (hence, unavoidable) provision of performing such reporting every 6 months. Reducing the overall complexity and level of granularity would materially come towards the administrative needs of supervised counterparties and render such EMIR-3-newly-introduced reporting i) more focused, ii) proportional to its goal(s) and iii) effective in terms of providing an overall, comprehensive view of the activities and risk exposures (which is anyway further to what is already available, thanks to the recently enhanced EMIR-Refit New Reporting Regime).

More specifically, ESMA’s proposals require the provision of information to NCAs on activity and risk exposures which is *de facto* already available at EU Trade Repositories (TRs). In this respect, EMIR’s Article 7b states that counterparties “*shall use the information reported under Article 9 where relevant*”. This implies that counterparties *may* use this information, and it does not require the ESMA RTS to mandate Article 9 information to the NCAs. In doing so, ESMA’s proposal seems going beyond the level-1 mandate by introducing an additional layering of reporting, as it requires counterparties to aggregate information which is already available at authorised TRs and, consequently, to NCAs. The effort required to counterparties would be significant insofar as the reporting requirements will demand them to develop new reporting systems and/or data retrievals. In all likelihood, the necessary time horizon for counterparties to comply with such reporting requirements would be longer than the 6 months envisaged by ESMA for the first submission of data to competent authorities (Article 10 of the draft RTS). These new reporting systems would add itself to those already implemented to comply with Trade Reporting under EMIR and the final outcome would be a duplication of effort, further internal-systems complexity and further costs, which we believe should be avoided.

We are pleased to read, under par. 180 (on page 39) that ESMA is planning to supplement the draft RTS with Level 3 guidance to ensure a consistent application of said reporting requirements. We believe that such Level 3 guidance would be greatly appreciated as it would provide (counterparties subject to active account and related reporting requirements) with a clearer view on the magnitude of the necessary changes, and on the time needed to comply with them. Given the peculiar selection of information required by the reporting required under Art.7b of EMIR 3.0, we believe that the forthcoming Level-3 guidance by ESMA will have to be carefully calibrated in a way to avoid forcing counterparties to operate further complex IT deployment(s) necessarily implying consistent investments and time to implement them. Conversely, they should be free to identify the most suitable implementation approach responding to Art.7b requirement. Accordingly, we look forward to a possible public consultation on this Level-3 documents to elaborate further on this scope.

We note, though, that ESMA does not indicate a possible timeline or date for the adoption of this Level 3 guidance, and this might represent a shortcoming. Indeed, in our opinion ESMA should reconsider the first reporting date, offering much more than 6 months to the counterparties for setting their reporting systems and processes. Both level 2 (RTS) and level 3 (interpretative guidance) are currently not definitive or available to the counterparties, meaning that no IT setting could be properly started by the counterparties. Taking into account the previous case in which new reporting requirements have been issued (i.e. EMIR Refit on 29th of April 2024), the Delegated Regulations have been issued in October 2022 and the ESMA EMIR Guidance in December 2022, much more than 6 months before the compliance date. Based on latter evidence and on the basis of our members’ analysis, we believe that ESMA should postpone the first reporting date to at least 12 months from entry into force of the Delegated Regulation (on this, please, see also the example we provided under Q21).

<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>

ESMA proposed to include, within the reporting scope of activities and risk exposures, the aggregate value of initial and variation margins, adjusted for any applicable haircuts, and cumulated since the first reporting of posted margins for the relevant transactions.

On the basis of the analysis run with our members, we consider such inclusion avoidable for the following reasons:

* The activities and risk exposures whose calculation is proposed by using metrics of gross and net notional amounts, and the number of trades, should already be sufficient to provide NCAs and ESMA with an appropriate overview of EU counterparties’ exposures in the derivative contracts subject to the Active Account requirement.
* Adding qualitative and quantitative information on margin activity, in the way proposed by ESMA, would bear important computational and administrative implications for counterparties, not consistent with the broader goal of simplifying EU provisions and rules, as indicated by the new European Commission. On the medium term, this could also have implications for the overall degree of attractiveness of the EU derivatives’ markets, compared to markets in other jurisdictions.

<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>

On the basis of our analysis, we cannot support ESMA’s proposal to include the reporting of the UTIs to add valuable information from a supervisory perspective, as it actually appears:

* redundant as firms do already report UTIs as part of their Article 9 reports, and the same stands for the relevant gross notional amount(s). As ESMA acknowledges (in the Impact Assessment, Section 7.3.3, page 66, “Compliance costs”), requiring firms to report the UTI for the relevant derivatives contracts subject to the AAR, would “*require counterparties to report additional fields, which would increase the reporting costs and burden*”;
* “unfit” for the specific active account related requirements.

Consistently, in our opinion ESMA should not require UTIs to be reported, in line with Option 1 set out in the Impact Assessment.

With reference to the 2nd bullet point above, we notice that, in ESMA view, the inclusion of the list of UTIs for the relevant derivative contracts subject to the AAR “*would enable competent authorities to better perform their supervisory duties by verifying the information reported by counterparties under Article 7b against the reports submitted to trade repositories under Article 9*” (par. 166 of the Consultation Paper).

Actually, as we understand it by the reading of Level-1 provisions, we believe that the purpose of the AAR reporting obligation should be exclusively to monitor compliance with the AAR, and no further purposes should be annexed to it. Even more so, we believe that such goal would be much better attained through using the information already at the TRs, as this would make it possible to avoid i) discrepancies between the data reported to the TRs (as per Article 9) and information provided under Article 7b of EMIR 3, and ii) duplications and additional operational complexities.

<ESMA\_QUESTION\_AAR\_18>

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

<ESMA\_QUESTION\_AAR\_19>

Our concerns related to many points were already raised in the answers to previous questions.

As “holding financial resources” is not required under EMIR 3.0, in our opinion the draft RTS’ Article **8(1)(c) (i)** should be amended as it follows: “*the account statements for cash and collateral, including the number of the account ~~and the aggregate amount of financial resources provisioned~~*”.

Further, as mentioned in our previous answers above, having regard to the dedicated staff member “*in charge of ensuring the proper functioning of the clearing arrangements at all times*”, seems disproportionate, especially when it comes to medium and smaller financial counterparties, even bearing some potential drawbacks. Therefore, we suggest ESMA to amend the draft RTS’ Article **8(1)(c) (ii)** accordingly.

Given that transferring positions, and position risk, from a CCP to another is a complex procedure, and it cannot be completed “quickly”, we propose ESMA to amend the draft RTS’ Article **8(1)(b) (ii)** in the sense not to require reporting on the internal arrangements supporting a large flow of transactions by deleting the following “(..) *the internal systems to monitor the counterparty’s exposures and governance arrangements of the counterparty to support a large flow of transactions ~~from positions held in a clearing service of substantial systemic importance pursuant to Article 25(2c) under different scenarios assessing any potential legal and operation barriers to this effect~~*”.

This proposal here above recalls our more specific consideration on “*any potential legal barriers*” elaborated in our response to Q3, paragraph 2, bullet point 1.

<ESMA\_QUESTION\_AAR\_19>

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

<ESMA\_QUESTION\_AAR\_20>

We highlight some inconsistencies related to the synchrony of different requirements. Indeed, we hardly see how firms should report to NCAs each semester on the compliance with the representativeness requirement, while this requirement is based on an annual average basis, as proposed in RTS’ Article 9(1)(c).

Also, consistently to our answers to Q18, the compliance with the representativeness requirement does not strictly needs to be assessed by means of UTIs reporting.

<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>

On the basis of our analysis, we consider that ESMA should allow for sufficient time to in-scope counterparties i) to implement the necessary adaptations and changes to the new technical framework needed to submit the reports related to the Active Account regime, and ii) to allow for adequate testing time of such reports’ compilation and submission.

Also, as we elaborated under Q.16, ESMA should reconsider the first reporting date, offering counterparties more than 6 months for the set-up of their reporting systems and processes. Indeed, both level 2 (RTS) and level 3 (Guidance) are currently not definitive or available to the counterparties, meaning that no IT setting could be properly started by the counterparties (or by their external providers). Even taking into account the previous case(s) of substantial amendments in the scope of EMIR reporting (i.e. EMIR Refit on 29th of April 2024), we recall that the Delegated Regulations were issued in June 2022, published in OJEU in October 2022, being followed in December 2022 by the relevant ESMA’s Guidance. This sums up to much more than 6 months before the compliance date of April 2024. Hence, our suggestion is to provide for (at least) 12 months from entry into force of this draft Delegated Regulation.

Further to this, while we deem it positive to establish set dates for the reporting by counterparties to NCAs, we believe it would bear significant added value amending the draft RTS to specify “calculation periods” – rather than “a single date” on which to report the data – followed by a “submission window” or windows (each one after any “calculation period(s)”) rather than a specific date on when to report. This would recognize firms for the necessary time and flexibility they need to collate data, conduct and validate the calculations. As an instance, we would suggest ESMA the following:

* 31/01-30/07: calculation period, i.e. the time frame to which the data to be reported are referring to
* 31/07-31/10: time frame to collate data, verify any need for their “clean up” and consistent formatting, running usual and time-consuming overall checks, allowing time for internal auditing, etc.
* 31/10: deadline to transmit the relevant data of such reporting

What we believe it could represent an enhanced version of the example above would be providing not for a specific final date to transmit the data but for a 2-week time window, so that the deadline would be represented by

* “01/11-15/11”: **deadline window** to transmit the relevant data of such reporting.

The advantage of such “deadline window” would consist in avoiding i) any situation in which any unforeseen event on the 31/10 could determine a formal delayed reporting; ii) any “bottle neck” effect for both the parties subject to EMIR’s provisions, Trade Repositories and any other involved stakeholder(s).

<ESMA\_QUESTION\_AAR\_21>

1. ESMA91-372-1945 Assessment Report under Article 25(2c) of EMIR [↑](#footnote-ref-2)