



ESMA Consultation Paper on Active Account Requirement under EMIR 3

February 2025

On 20 November 2024, ESMA published a public consultation on Active Account Requirement (AAR) set out in the new Regulation known as EMIR 3¹, which includes a proposal with the appropriate regulatory technical standards (RTS) detailing operational conditions, representativeness obligation and reporting requirements of said obligation.

With the said initiative, ESMA aims to gather views on the three aforementioned issues and lists specific proposals in order to identify relevant aspects, including, among others, those about types of derivative instruments subject to the AAR, maturity ranges and size of trades, as well as stress test frequency and reporting methods.

Derivative contracts subject to the AAR are as follows: over-the-counter (OTC) interest rate derivatives in euros, OTC interest rate derivatives in Polish zloty, and short-term interest rate derivatives (STIR) in euros.

It is worth mentioning that the purpose of establishing said requirement is to reduce the European Union's (EU) clearing members and clients' excessive exposures to third-country central counterparties considered "systemically important" (Tier 2 CCPs), namely LCH Ltd² and ICEU³, with the final objective of contributing to financial stability. Initially, the Commission's proposal was to have a percentage of such transactions cleared by central counterparties of the EU (EU CCPs), to finally establish a specific number of transactions. Considering the diversity of counterparties and the nature of their transactions, the decision to set a percentage would probably involve a more complex calculation, which would entail greater efforts for counterparties and competent authorities.

¹ Regulation (EU) 2024/2987 of the European Parliament and of the Council, of 27 November 2024, amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets.

² *LCH Limited (LCH ltd)* became a third country central counterparty recognised by the EU as of the day after the EU Treaties ceased their application in the United Kingdom (Brexit). Clearing services provided by LCH Ltd, and considered of substantial systemic importance, are as follows: *SwapClear* for the clearing of interest rate derivatives in euro and Polish zloty.

³ Similarly, *ICE Clear Europe Limited (ICEU)* became an EU-recognised central counterparty following Brexit. Clearing services provided by ICEU, considered of substantial systemic importance, are *Credit Default Swaps (CDS)* contracts and *STIR* services, for euro-denominated products in both cases. Clearing of CDS contracts ceased as of October 2023.

Which parties are obliged to comply with the AAR requirement?

The requirement is aimed at certain financial counterparties (FCs) and non-financial counterparties (NFCs)

with exposures to said substantial systemic importance clearing services so that they maintain an active operational and representative account in one of the EU CCPs. Specifically, the requirement falls on those counterparties that meet the following two conditions: (i) being subject to the clearing obligation and (ii) exceeding the EUR 3 billion gross notional value threshold in any of the derivative instrument categories subject to the said requirement, either individually or aggregated, under Article 10.4(b) of EMIR, and Article 11 of the Delegated Regulation on clearing thresholds⁴.

It is worth noting that the AAR is applied at group level for entities that are under consolidated supervision in the Union. This means all derivative contracts cleared by any entity within the group, including those established in third countries must be considered.

⁴ Commission Delegated Regulation (EU) No 149/2013, of 19 December 2012, supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards regulatory technical standards concerning indirect clearing arrangements, clearing obligation, public register, access to the trading venue, non-financial counterparties and risk mitigation techniques applicable to OTC derivative contracts not cleared by a central counterparty.

What are the expected operational conditions?

The aforementioned document sets forth three operational conditions (provided for in Articles 1 and 2 of the RTS proposal) for duly compliance by those FCs and NFCs subject to the AAR:

- Condition (a) - Permanent functional account. The EU CCP account must prove to be functional permanently. This includes being able to prove before the competent authority that the following aspects are in place: IT connectivity (through due diligence checks); internal processes (formalised through manuals, policies and procedures), and the legal documentation associated with the account (i.e. contracts). ESMA requires all the above to be duly documented for verification purposes.

- Condition (b) - Capacity to manage large contract volumes. FCs and NFCs must prove to the authorities that they have the systems and resources available to use the account for large volumes of derivatives contracts, even on short notice. They must be able to manage, in a short period, a large flow of transactions from positions held in a systemically significant clearing facility of a third country. To assess such condition, the operational capacity of the account is expected to manage an increase of up to three times its last twelve months' clearing activity within one month.

- Condition (c) - Clearance of new transactions. Counterparties must prove to the authorities that the account can always clear all new transactions for derivative contracts subject to the AAR.

Said operational conditions will be subject to stress tests (provided for in Article 3 of the RTS proposal), the purpose of which is to ensure the technical and functional capacity of counterparties to make use of their active accounts under stress situations. More specifically, it foresees a scenario of increased clearing activity of up to 85% of the total outstanding clearing activity of counterparties subject to the AAR within the stress tests. The counterparties must obtain a written certification from an EU CCP confirming their approval. Testing frequency (to be performed simultaneously for all CCP accounts) will be determined by the notional clearing volume outstanding: six months for counterparties above EUR 100 billion, or one year if such threshold is not exceeded.

What does representativeness obligation⁵ entail?

In order to ensure that the active account at an EU CCP is used and reflects a minimum representative amount of clearing activity, counterparties are required to clear in the active account of an EU CCP a certain and representative number of transactions during the reporting period in the relevant derivative contracts, specifically those that are being cleared in a third-country clearing service considered of significant systemic importance. The EMIR requires compliance with the representativeness obligation of the AAR only to

counterparties with a 'notional clearing volume outstanding' of more than EUR 6 billion in the relevant derivative contracts.

The RTS proposal includes specifications for OTC interest rate derivatives in euros (Article 4), OTC interest rate derivatives in Polish zloty (Article 5), and short-term interest rate derivatives in euros (Article 6). Counterparties with a notional clearing volume outstanding below the above-mentioned threshold are exempted from said obligation.

For OTC interest rate derivatives in euros, counterparties must clear a minimum number of trades in each of the five most relevant subcategories in the EU CCP for IRS, FRA, and OIS⁶ derivative classes. These subcategories will be selected based on provisions of Annex V of the RTS proposal, which includes maturity and trade size combinations to define the aforementioned subcategories. The reference period to calculate the minimum number of transactions is: one month for counterparties with a notional volume outstanding of more than EUR 100 billion, and six months for the rest of the counterparties.

For OTC interest rate derivatives in Polish zloty, counterparties must clear the minimum number of trades in the most relevant subcategory in the EU CCP for each of the IRS and FRA derivative classes (the most relevant subcategory will also be selected from the maturity and trade size combinations proposed in Annex V). In this case, the reference period to calculate the minimum number of transactions is twelve months for all cases.

Finally, for short-term interest rate derivatives in euros (EUR STIR), counterparties must clear the minimum number of trades in each of the four most relevant subcategories in the EU CCP in the following derivative classes: 3-month EUR STIR referencing Euribor, and 3-month EUR STIR referencing €STR (in this case, maturity will be the only variable considered to differentiate subcategories). The reference period to calculate the minimum number of transactions depends on the reference index: one and six months for Euribor; six and twelve months for €STR. When exceeding the EUR 100 billion threshold, the first one would apply, otherwise, the second one.

In all three articles, the minimum number of trades to be cleared in each of the most relevant subcategories, per category of derivative contracts and reference period, shall be five⁷ on an annual average. However, when the total number of transactions to be cleared in a calendar year exceeds half of the total number of transactions of the counterparty within the previous twelve months, the counterparty shall only clear one trade in each of the most relevant subcategories per category of derivative contracts per reference period.

⁵ Section 4 of Article 7a of EMIR.

⁶ Fixed-to-float interest rate swaps, Forward rate agreements, and Overnight index swaps, respectively.

⁷ Minimum provided for in section 4 of Article 7a of EMIR.

What are the expected reporting requirements of the AAR

Counterparties (FCs and NFCs) subject to the AAR must report to their relevant authorities (which will subsequently inform ESMA) data regarding the last 12 months every six months so that they can assess the compliance requirements based on their reported clearing activity. Reporting requirements include information on activity, risk exposures, operational conditions and the representativeness obligation. To this end, three specific reporting templates have been included in the RTS annexes.

As a peculiarity, the proposal indicates that information on activities and risk exposures should be reported at the level of the counterparty. However, when a reporting counterparty is part of a group subject to consolidated supervision in the Union, information should also be reported at the levels of any subsidiaries, both within and outside the EU.

Additionally, ESMA suggested including a unique transaction identifier (UTIs) list for relevant derivative contracts subject to the AAR, which were added to activity calculation and risk exposures. This initiative pursues better performance by authorities of their supervisory functions by cross-checking the information reported by counterparties, under Article 7b (on monitoring the active account obligation) with the reports submitted to trade repositories pursuant to Article 9 (on reporting obligations), both under EMIR. In addition, the inclusion of UTIs could contribute to a better detection of data quality problems.

Links of interest:

[Consultation Paper on the Conditions of the Active Account Requirement under EMIR 3](#)

[Regulation \(EU\) 2024/2987 of the European Parliament and of the Council of 27 November 2024 amending Regulations \(EU\) No 648/2012, \(EU\) No 575/2013 and \(EU\) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets \(EMIR 3\).](#)