

## ISDA RESPONSE TO ESMA CONSULTATION ON THE CONDITIONS FOR THE AAR

### 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

## Celebrating 40 Years

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 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 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 response to question 1.

#### *Operational conditions:*

4. 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 response to question 2 and drafting proposal in the Annex.
5. 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 response to questions 3 and 4 and drafting proposal in the Annex.
6. 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.
7. 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:*

8. 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

## Celebrating 40 Years

be expected to comply with the representativeness requirement on a best effort basis upon entry into force of EMIR 3.0.

9. 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.
10. 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.
11. 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:*

12. 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](#) published on 20 December 2024. At the request of their NCA, firms should provide further information. See our response to question 16.
13. 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.
14. 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.
15. 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.

**Question 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?**

We appreciate that ESMA has set out the AAR scope on which it has based its quantitative assessment given that EMIR 3.0 Level 1 text is in some places ambiguous. As set out below we believe that further clarifications/amendments are necessary regarding the methodologies for calculating the EUR 6bn, EUR 100bn, and 85% thresholds and the threshold under fifth subparagraph of Article 7a (4). We also suggest amendments in the Annex on how to codify how groups consolidated in the EU under the CRD (Chapter 2 of Title II of Part One of Regulation (EU) No 575/2013) can meet the AAR.

We welcome the clarifications in paragraphs 16 to 33 of the CP on the **two conditions that counterparties must meet** to become subject to the AAR under EMIR Article 7a (1). We note that only EUR STIR traded on third country regulated markets that are not considered equivalent under MiFID would be included in the clearing threshold calculations (“the two conditions”) under Article 7a (1) and understand that this interpretation is carried over to the EUR 6bn and EUR 100bn threshold calculations.

We note that, if a counterparty is subject to **group consolidated supervision** in accordance with the CRD, the counterparty should consider all derivative contracts that are cleared by that counterparty or other entities in the group to assess whether it is subject to the AAR and the representativeness obligation. We also note that paragraph 40 of the CP provides that the entities that are part of a group subject to consolidation in the EU can fulfil the operational and representativeness conditions of the AAR through one entity in the group (i.e. only one entity in the group would be required to open an account and meet the operational and representativeness obligations on behalf of the whole group). We would suggest that this is made clear by a new Article 6A (see proposed drafting in the Annex).

We welcome the clarification that the **EUR 6bn exemption** should be measured in gross notional value of the aggregate month-end average position for the previous 12 months, that it applies on aggregate across all the relevant derivative contracts, is calculated at group level if the group is subject to consolidated supervision in the EU and does not include client clearing activity. We also understand that, in line with the approach outlined in section 3.2 of the CP, it excludes intragroup transactions. Finally, only cleared relevant derivatives products shall be included for calculations of both EUR 6bn and EUR 100bn thresholds as Level 1 text refers to “*notional clearing volume outstanding*”. We would welcome clarification that the methodology for calculating the **EUR 100bn** threshold is the same as for the EUR 6bn threshold. We also note that the CP does not clarify what is the first 12-month window that must be used for the EUR 6bn and EUR 100 bn thresholds.

The exemption foreseen for counterparties clearing at **least 85% of their derivatives activity on an EU CCP** aims at incentivising firms to clear a very high proportion of trades at EU CCPs. While we note that ESMA is not mandated to clarify the methodology for the 85% computation in the RTS, we have no objection to the interpretation put forward in the CP that the 85% threshold applies on

## Celebrating 40 Years

aggregate across all the relevant derivative contracts, and is calculated at group level if the group is subject to consolidated supervision in the EU and excludes intragroup transactions.

However, suggesting that 85% of derivative contracts be measured in gross notional value of the aggregate month-end average position for the previous 12 months (paragraph 46 of the CP) would have the unintended effect of disincentivising firms from clearing most of their trades at an EU CCP. In practice, using the 12-month lookback approach will limit this provision to entities who already clear their portfolios at an EU CCP. This seems to be contrary to the stated aim of EMIR 3.0, to incentivise clearing on EU CCPs where such clearing is currently taking place on non-EU CCPs. Most counterparties will need some time to achieve the goal of 85% clearing at an EU CCP. EMIR Level 1 text does not prescribe a lookback period for the calculation of the 85% nor empowers ESMA to specify the applicable period.

If a firm is unable to qualify for the exemption in time and therefore has to set-up processes to meet the operational, stress-testing and reporting requirements, it will lose all incentives to meet the 85% threshold in the future. As it will not recoup any costs incurred in meeting the operational and reporting requirements, it is more likely that the firm would maintain a dual clearing strategy.

We recommend that counterparties subject to the AAR and wishing to benefit from the exemption shall notify their NCAs of their intention to do so as from June 25 June 2025 and would have to demonstrate over the following 12 months (transitional period) that they adopt clearing on EU CCPs. Ultimately, a snapshot of their positions in June 2026 will demonstrate that 85% of their clearing activity is performed at EU CCPs. The notification to the NCAs of counterparties' intention to benefit from the exemption could be accompanied by a commitment/written statement from the counterparties that they will reach the 85% threshold by June 2026.

Finally, we also recommend that ESMA clarifies **fifth subparagraph of Article 7a (4)**, in particular what trades are included in the "*counterparty's total trades for the preceding twelve months*". We recommend that i) only the cleared contracts are included (not uncleared), ii) only the relevant derivative contracts (not all contracts) are included and iii) the calculations are conducted at the "class level" (e.g. EUR STIR referencing Euribor) and not on aggregate.

### Summary of the Active Account thresholds

We have set out in the table below our understanding of how the thresholds under Article 7a of EMIR are expected to be computed for Financial Counterparties (FC) other than funds. We have also included in red suggested amendments/clarifications.

Celebrating 40 Years

Description of threshold	Threshold value	Type derivative contracts	Calculation methodology	First lookback period	Client clearing activity	Group
Application of AAR to FCs – condition 1*, **,***	EUR 1bn gross notional	Credit derivatives not executed on a regulated market or third country equivalent regulated market (cleared and uncleared)	Month-end average for previous 12months	N/A	Included for the purpose of calculating condition 1	Group level in line with Article 2 (16) and Article 4a(3) of EMIR
	EUR 1bn gross notional	Equity derivatives not executed on a regulated market or third country equivalent regulated market (cleared and uncleared)	Month-end average for previous 12month			
	EUR 3bn gross notional	Interest rate derivatives not executed on a regulated market or third country equivalent regulated market (cleared and uncleared)	Month-end average for previous 12months			
	EUR 3bn gross notional	Foreign exchange derivatives not executed on a regulated market or third country equivalent regulated market (cleared and uncleared)	Month-end average for previous 12months			
	EUR 4bn gross notional	Commodity and other derivative contracts not executed on a regulated market or third country equivalent regulated market (cleared and uncleared)	Month-end average for previous 12months			
Application of AAR to FCs – condition 2  Either individually or on aggregate across the categories of in-scope transactions (para 20 CP)	EUR 3bn gross notional	<p>EUR IRS not executed on a regulated market or third country equivalent regulated market (cleared)</p> <p>PLN IRS not executed on a regulated market or third country equivalent regulated market (cleared)</p> <p>EUR STIR not executed on a regulated market or third country equivalent regulated market (cleared)</p> <p><u>Unclear in CP</u> whether calculation includes both cleared and uncleared contracts.</p> <p><b>ISDA proposal :</b>  <b>include only cleared contracts</b></p>	Month-end average for previous 12 months on an individual basis or on aggregate across the categories of in-scope transactions	<u>Unclear in CP</u>  <b>ISDA proposal:</b>  <b>The 12 month look-back periods should be the same as the look-back periods for the purposes of Article 4a and the first look-back period should be the 12 months ending before the FC's last annual calculation date under Article 4a before EMIR 3.0 entered into force (e.g., for FCs whose calculation date is 17 June in each year, the 12 months ended 31 May 2024)</b>	Included for the purpose of calculating condition 2	<p>Group level (excluding intragroup transactions) if the FC is part of a group subject to consolidated supervision in the EU under the CRD</p> <p>Entity level (including intragroup transactions) if the FC is not part of a group subject to consolidated supervision in the EU under CRD</p>

Celebrating 40 Years

Exemption from representativeness	EUR 6bn gross notional	<p>EUR IRS not executed on a regulated market or third country equivalent regulated market (cleared)</p> <p>PLN IRS not executed on a regulated market or third country equivalent regulated market (cleared))</p> <p>EUR STIR not executed on a regulated market or third country equivalent regulated market (cleared)</p>	Month-end average for previous 12 months on aggregate across the categories of in-scope transactions	<u>Unclear in CP</u>	Excluded for the purposes of calculating whether the FC's notional clearing volume outstanding exceeds the EUR 6 bn threshold	<p>Group level (excluding intragroup transactions) if the FC is part of a group subject to consolidated supervision in the EU under the CRD</p> <p>Entity level (including intragroup transactions) if the FC is not part of a group subject to consolidated supervision in the EU under CRD</p>
Large counterparties for representativeness	EUR 100bn gross notional	<p>EUR IRS not executed on a regulated market or third country equivalent regulated market (cleared)</p> <p>PLN IRS not executed on a regulated market or third country equivalent regulated market (cleared))</p> <p>EUR STIR not executed on a regulated market or third country equivalent regulated market (cleared)</p>	Month-end average for previous 12 months on aggregate across the categories of in-scope transactions	<u>Unclear in CP</u>	Excluded for the purposes of calculating whether the FC's notional clearing volume outstanding exceeds the EUR 100 bn threshold.	<p>Group level (excluding intragroup transactions) if the FC is part of a group subject to consolidated supervision in the EU under the CRD</p> <p>Entity level (including intragroup transactions) if the FC is not part of a group subject to consolidated supervision in the EU under CRD</p>
Exemption from operational and reporting conditions	85% of gross notional	<p>EUR IRS not executed on a regulated market or third country equivalent regulated market (cleared)</p> <p>PLN IRS not executed on a regulated market or third country equivalent regulated market (cleared))</p> <p>EUR STIR not executed on a regulated market or third country equivalent regulated market (cleared)</p>	<p>Month-end average for previous 12 months</p> <p>On aggregate across the categories of in-scope transactions.</p>	<p><u>Unclear in CP</u></p> <p>ISDA proposal: snapshot of positions in June 2026</p>	Excluded for the purposes of calculating the 85% threshold	<p>Group level (excluding intragroup transactions) if the FC is part of a group subject to consolidated supervision in the EU under the CRD</p> <p>Entity level (including intragroup transactions) if the FC is not part of a group subject to consolidated supervision in the EU under CRD</p>
Derogation allowing clearing of a single trade in each relevant sub-	A/B is more than 50%, where: the numerator (A) is the total number	<u>Calculation of denominator is unclear</u>	<u>Specified period for denominator is unclear in CP</u>	<u>Unclear in CP</u>	<u>Unclear in CP</u>	<u>Unclear in CP</u>

**Celebrating 40 Years**

category (instead of at least five trades in each relevant sub-category)	of trades required to be cleared in a reference period in all of the most relevant sub-categories if the derogation did not apply and the denominator(B) is the total trades of that counterparty for the preceding 12 months.	ISDA proposal:  The aggregate total number of cleared OTC derivatives trades in all the most relevant subcategories per class of derivative contracts that apply for the purposes of the representativeness obligation			ISDA proposal:  Excluded for the purpose of calculating the denominator	ISDA proposal: entity level calculation
--	--	--	--	--	---	--

\* This will be subject to changes when the clearing threshold methodology is amended.

\*\* Some FCs will not calculate the clearing threshold and opt-in to the clearing obligation.

\*\*\* FCs not subject to the clearing obligation when EMIR 3.0 enters into force should only be treated as meeting condition 1 from the expiry of the four month period referred to in Article 4a.

In line with the existing process for calculating the clearing threshold, clients will collect the necessary information to compute the EUR 3bn and EUR 6bn thresholds from all their portfolio managers and then send the outcome of the computation back to their respective portfolio managers. The portfolio manager may therefore not be able to anticipate when the EUR 3bn and EUR 6bn thresholds are breached. While Article 7a (1) introduces a 6-month phase-in for counterparties to establish an AA, it is unclear whether the representativeness requirement would be applicable immediately upon the EUR 6bn threshold being breached. If this was the case, it would be operationally very challenging for clients to meet.

**Question 2: Do you agree with the above approach for condition (a)? Are there other requirements that ESMA should consider for meeting condition (a)?**

While it is helpful that ESMA recognises that operational capacity should not include the financial resources of the clearing participant (paragraph 67 of the CP), we note that the explanatory section of the consultation does not have any legal effect, and we urge ESMA to ensure that the draft RTS reflect this overarching principle. See our response to question 3 and our drafting proposal in the Annex for more detail.

In particular, we are very concerned with the draft RTS Article 1 paragraph (1) (c) requirement to “*hold cash and collateral accounts with sufficient financial resources to meet the obligations arising from direct participation in an EU CCP*” as this implies that counterparties are required to have sufficient financial resources to meet the stress-testing requirements set out in draft RTS Article 3. This is in contradiction with paragraph 67 of the ESMA CP that states that operational capacity should not include the financial resources of the clearing participant. As EMIR Article 7a (8) first subparagraph requires ESMA to develop RTS “*to further specify the requirements under paragraph 3, points (a), (b) and (c), of this Article, the conditions of the stress testing thereof*”, we understand that condition (a),



## Celebrating 40 Years

including ESMA's proposal to have sufficient financial resources, could have to be stress-tested as per draft RTS Article 3.

In addition, we are concerned that the requirement to “*hold cash and collateral accounts with sufficient financial resources to meet the obligations arising from direct participation in an EU CCP*” could result in counterparties below the EUR 6bn threshold being required to have a live trade at an EU CCP. EMIR Article 7a does not require counterparties below the EUR 6bn threshold to clear any trades on an EU CCP, and the RTS should reflect this.

Based on EU CCPs' participation requirements, it seems that clearing members are not always required to open both cash and securities accounts (e.g., if they only intend to post cash margin, they only need to open a cash account). Therefore, we have suggested (see Annex) amending draft RTS Article 1 so that counterparties need to establish cash and/or collateral accounts as required by the EU CCP or (for counterparties indirectly clearing) the clearing member or client providing clearing services.

### **Question 3: Do you agree with the above approach for conditions (b) and (c)?**

As noted under our response to question 2, when assessing whether the account at the EU CCP has the operational capacity to withstand a large increase in clearing activity, the EU CCP should only assess the operational capacity of the account and should not consider whether the relevant clearing participant(s) have the financial resources to withstand this increase. Compliance with the operational account conditions should not result in counterparties having to hold more financial resources than they are otherwise required to do so (e.g., to comply with prudential requirements or the participation requirements of the CCP). To address this concern, we have provided drafting in the Annex, which includes proposed changes in RTS Article 1, Article 2, Article 3, Recitals (4) and (5) and a new Recital (6A).

We welcome that the draft RTS do not require firms to test how they would close out their positions at that Tier 2 CCP and re-open them at an EU CCP. It is neither plausible nor desirable that EU firms would be able to close thousands of legacy contracts at the Tier 2 CCP and reopen the positions at an EU CCP. This is because it would create huge operational and economic challenges, but more importantly, because it is highly unlikely that there would be sufficient market capacity<sup>1</sup>.

---

<sup>1</sup> Namely, should EU firms be required to have the positions they hold at a Tier 2 CCP (legacy positions) cleared at an EU CCP, they must close out their positions at that Tier 2 CCP and re-open them at an EU CCP. This would have to be achieved by means of 1) for each transaction at the Tier 2 CCP, a “closing” transaction which is equal and opposite to the open transaction at the Tier 2 CCP, to be cleared at the Tier 2 CCP and compressed against the corresponding open transactions and 2) an “opening” transaction to be cleared at the EU CCP in question, replicating the market position being closed. This “opening transaction” would not necessarily be the exact same as the “closing transaction”. Such “remigration” exercise is not cost neutral. There will be a differential in pricing between the two transactions because of the different margin requirements between the two CCPs (including as a result of the different portfolio netting impacts at the different CCPs) and the price difference (“basis”) between the two CCPs. EU firms will also have to pay the bid-ask spread between the closing and the opening transaction. Depending on the number of EU firms requiring such closing transactions at the same time, likely in the same direction as other EU firms, market capacity might be not sufficient, which would lead to even higher prices paid by EU firms.

## Celebrating 40 Years

We understand that the objective of the proposal is to allow firms to assume that there would be a significant increase in volume that needs to be cleared using the AA. It should therefore be sufficient for counterparties to set up “*internal systems to monitor the counterparty’s exposures and governance arrangements of the counterparty to support a large flow of transactions*”. The draft RTS Article 2 (1) (a) should not, require counterparties to “*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 operation barriers*” [our emphasis added]. We recommend that the underlined text is removed from the final RTS. See proposed drafting in the Annex.

We believe it is pragmatic to treat EMIR Article 7a (3) conditions (b) and (c) as a single issue focused solely on whether the AA can be used to clear a large volume of transactions in a short period. Requiring testing a threefold increase in clearing of notional outstanding in the relevant derivative contracts over a one-month period is, however, a very extreme scenario.

We note that draft RTS Article 2 (1) (c) requires the counterparties to obtain from the authorised CCP 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 relevant derivative contracts. We understand this to mean:

- Each of the EU CCPs at which an EU counterparty clears any relevant derivative contracts needs to confirm (following successful testing) that the counterparty can sustain three times the notional outstanding cleared for the previous 12 months in the relevant derivative contracts (calculated on the basis of the aggregate month-end average positions for the previous 12 months held across both house and clients account at the EU CCP in question).
- The written statement from the EU CCP will simulate an increase of both the house and client’s account. The clearing member will transmit the certification to its clients.
- The written statement to the clearing member will be generically written to ensure that it can be forwarded onto its clients without breaching any applicable confidentiality obligations.
- The EU CCP is testing the operational capacity of the counterparty account, i.e. the IT systems (not the financial resources). It should not constitute a full audit.

We ask that the RTS also includes a requirement on the EU CCP, following successful testing for compliance with the operational conditions, to provide the written statement upon request, without undue delay, for free, in English if requested. See proposed drafting in the Annex. As written, the obligation falls on counterparties to request this statement from the CCP, but there is no obligation on the CCP to provide such a statement. If there is no obligation on the CCP to provide the statement this may lead to counterparties failing to comply with Article 8(1)(d)(i).

Finally, we object to the proposed requirement (RTS Article 2 (1) (b)) to appoint at least one dedicated staff member with sufficient knowledge to support the proper functioning of the clearing arrangements at all times. There is no such precedent in EMIR (e.g. no requirement to appoint a staff member with respect to meeting the clearing obligation). We do not understand the purpose/role of such staff member and note that the functioning of the clearing arrangements would typically be

## Celebrating 40 Years

done by a team, not a single individual. While firms will be responsible to meet the AAR, they should retain the flexibility to decide how best to allocate resources (including over time) to meet the requirement. We would be particularly concerned if the intention is for the staff member to be fully dedicated to this role and/or be personally liable if there is a compliance breach. Finally, we note that EMIR amends Article 76(2) of the CRD (2013/36/EU) and Article 26(1) of the Investment Firm Directive to require institutions to “*have effective processes to identify, manage, monitor and report [...] concentration risk arising from exposures towards central counterparties, taking into account the conditions set out in Article 7a of Regulation EU No 648/2012*”. There is therefore already a requirement in place for firms to have effective processes in place with respect to the AAR. We recommend that this dedicated staff requirement is deleted (see proposed drafting in the Annex) or alternatively, replaced with the ability to specify a team that is responsible, and which can act as a point of contact for regulators.

### **Question 4: Do you agree with the proposed approach for the annual stress-testing conditions (a), (b) and (c)?**

We support the approach to test the account’s capacity to withstand a substantial increase in volume and flow of transactions at short notice and within a short timeframe in the relevant derivatives contracts. We also support that the stress-testing will not be a pass or fail requirement (paragraph 81 of the CP). We urge ESMA to ensure that the drafting specifically reflects this principle in the draft RTS Article 3 on stress-testing. Please see the Annex for proposed drafting (Article 3 and Recital (5)).

We have no particular concern with draft RTS Article 3 (1) (a) that requires counterparties to conduct technical and functional tests verifying the operational capacity and the functioning of the IT connectivity with the CCP. However, whilst the draft RTS require counterparties to “*conduct*” the tests, we understand that in practice the stress-tests will be run at EU CCP level and simulated by the EU CCP. It is unclear what exactly the counterparties are expected to do in this regard, and hence what obligations could arise. We are also concerned that no obligation is imposed on the EU CCPs to run the tests.

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 a 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.

Draft RTS Article 3(1(c)) requires each of the EU CCPs at which an EU counterparty clears any relevant derivative contracts to provide a written statement that the account of the counterparty has the capacity to withstand a substantial increase in outstanding and new clearing activity of “*up to 85% of the total outstanding clearing activity of the counterparties in the derivative contracts referred to*

## Celebrating 40 Years

in Article 7a(6) of Regulation (EU) No 648/2012, published on ESMA's website in accordance with Article 6(2) of Regulation (EU) No 648/2012". We interpret this as follows:

- The EU CCP stress-tests that a substantial increase in outstanding and new clearing activity of "up to 85% of the total outstanding clearing activity of the counterparties in the derivative contracts referred to in Article 7a(6) of Regulation (EU) No 648/2012, published on ESMA's website in accordance with Article 6(2) of Regulation (EU) No 648/2012" can be managed in aggregate across all the counterparties that clear at that EU CCP.
- The stress-test is conducted at the same time for all accounts of counterparties and therefore the 85% test is conducted in aggregate across all the counterparties that clear at that EU CCP.
- The EU CCP issues a written statement to clearing members confirming that the individual counterparty account (across house and clients) can sustain a share of that increase. There is no specific simulation of the clearing member's or client's account.
- The clearing member will transmit the written statement to its clients.
- There is no fail or pass metric.

We note that the requirement is for an EU CCP to test its ability to clear 85% of the market in EUR IRS, PLN IRS and EUR STIR (the total outstanding clearing activity of the counterparties in the derivative contracts referred to in Article 7a (6) of Regulation (EU) No 648/2012) irrespective of the EU CCP's current market share for these derivative contracts. For an EU CCP that has very little clearing activity in these derivative contracts, it seems very disproportionate. We would recommend that the EU CCP is expected to conduct a stress-test that takes into account its existing market share. Otherwise, if say 10 EU CCPs are testing, the overall test would be in relation to 850% (85% x 10) of the existing global volume, which is manifestly excessive.

We also ask that the draft RTS Article 3 includes a requirement on the EU CCP to provide the written statement upon request, without undue delay, for free, in English if requested. See proposed drafting in the Annex.

Finally, we note that in draft RTS Article 3(1), point (c) should be point (b).

**Question 5: 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?**

We do not have any particular concerns with the proposed stress-testing frequency provided our understanding of the RTS (as set out in our response to question 4) is correct. We note, however, that if the "total outstanding clearing activity of the counterparties in the derivative contracts referred to in Article 7a (6) of Regulation (EU) No 648/2012" will only be published on ESMA's website annually, the purpose of conducting semi-annual stress-testing is not clear.

## Celebrating 40 Years

If the required stress-testing would resemble/have similarities with a CCP fire drill (which we strongly object to) the stress-test should be required on an annual basis for all counterparties irrespective of their clearing activities.

### **Question 6: Do you agree with the proposed classes of derivatives for EUR OTC IRD?**

While we continue to believe that ESMA should only identify 3 classes in total across the services of Substantial Systemic Importance (IRD denominated in EUR and PLN and STIR denominated in EUR), we have no particular concern with the 3 classes identified for EUR OTC IRD (EUR Fixed-to-float, EUR OIS, EUR FRA). We note that ESMA has selected classes already defined as part of the clearing obligation, which is helpful.

### **Question 7: Do you agree with the proposed classes of derivatives for PLN OTC IRD?**

As noted in our response to question 6, while we continue to believe that ESMA should only identify 3 classes in total across the 3 services of Substantial Systemic Importance, we have no particular concern with the 2 classes identified for PLN OTC IRD (PLN Fixed-to float and PLN FRA).

We also welcome that the proposed PLN IRS calibration recognises that the liquidity for PLN IRS at EU CCP is extremely limited.

### **Question 8: Do you agree with the proposed classes of derivatives for EUR STIR?**

We note that (i) liquidity for EUR STIR at EU CCP is limited and (ii) liquidity for EUR STIR referencing €STR is much lower. This should be taken into account with the overall EUR STIR calibration.

We also note that EU markets for options on STIRs are completely illiquid. Only one EU venue offers trading in STIR options and on this venue 20 lots have traded in the last five years, as against 453 million lots on a UK venue (ICE Clear Europe) over the same period. This means that almost no STIR options trades are executed on EU venues, almost no STIR options are cleared at EU CCPs, and therefore no price history for them exists on which market participants can base judgements about risk management, execution quality or economic value.

### **Question 9: Do you agree with the proposed maturity and trade size ranges for each class of derivatives in EUR OTC IRD?**

While we regret that ESMA has identified the maximum number of maturity (4) and maximum number of trade size ranges (3), we have no particular concern with the proposed maturity and trade size buckets despite some maturity buckets appearing challenging to meet (for instance 5Y+ for OIS falls outside the clearing obligation).

**Question 10: Do you agree with the proposed maturity and trade size ranges for each class of derivatives in PLN OTC IRD?**

We are pleased that ESMA has taken into account the lack of liquidity of PLN IRS at EU CCPs and is not proposing any maturity or size ranges for the 2 classes in PLN IRS.

**Question 11: Do you agree with the proposed maturity and trade size ranges for each class of derivatives in EUR STIR?**

We welcome that ESMA has not set any size ranges for EUR STIR given it is not possible for counterparties to control the size of a trade in STIR.

We believe that, given the liquidity in EUR STIR at EU CCPs, ESMA should take a more proportionate approach. We recommend ESMA only identifies 2 maturity buckets (not 4): one below and one above 1 year.

**Question 12: 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)?**

We do not object to the proposed number of most relevant subcategories in EUR IRS and PLN IRS. However, in line with our response to question 11, there should only be two maturity buckets for EUR STIR, which would mechanically result in only 2 most relevant subcategories for EUR STIR in Euribor and 2 most relevant subcategories for EUR STIR in €STR.

**Question 13: 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)?**

EMIR Article 7a (4) notes that for “*the representativeness obligation referred to in paragraph 3, point (d), to be fulfilled, counterparties shall clear, on annual average basis, at least five trades in each of the most relevant subcategories per class of derivative contracts and per reference period defined in accordance with paragraph 8, third subparagraph*”. Recital 14 also notes that “*The number of derivative contracts to be cleared should be at least five trades in the reference period on an annual average basis, meaning that in assessing whether counterparties fulfil the representativeness obligation, competent authorities should consider the total number of trades over a year*”.

The concept of annual average can be interpreted in different ways and we would welcome further clarification on how to compute annual averages. Is it calendar year or rolling year? How does it work when the most relevant subcategories change from one reference period to the next? How should

## Celebrating 40 Years

firms report compliance with representativeness to their NCA every 6 months under Article 7b if the requirement is based on an annual average?

**Question 14: 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)?**

We welcome that the reference period is 12 months for all counterparties given the lack of liquidity of PLN IRS at EU CCPs.

As set out in our response to question 13, we would welcome further clarification on how to compute annual averages.

**Question 15: 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?**

We note there is a mismatch between the proposed reference periods for EURIBOR and ESTR STIRS, which would be operationally difficult to manage. Our preference would be to align the reference periods for both categories to the longer reference period.

As set out under questions 13, we would welcome further clarification on how to compute annual averages.

**Question 16: 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?**

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. While EMIR Article 7b states that counterparties “*shall use the information reported under Article 9 where relevant*”, it does not require the RTS to mandate reporting of Article 9 information to the NCAs. Instead of asking firms to resend in aggregate form, and/or in the same transactional form, the data to NCAs, NCAs should extract the information in the EU TRs. It will be unnecessary, complex and costly to resend information even in aggregate forms when it is already available at EU TRs. Those entities that voluntarily delegate their reporting submissions may find the Article 7b reporting requirements even more challenging as, while they are liable to validate the completeness and accuracy of Article 9 reporting, they may not have the technology in place to submit reports themselves. Therefore, if NCAs were to extract the Article 9 information for the purposes of Article 7b in the EU TRs, market participants taking advantage of voluntary delegated reporting under Article 9 will not be adversely impacted. Furthermore, if NCAs use the information already available within EU TRs, the calculations to determine the activity and risk exposure are performed centrally and consistently, as opposed to each firm needing to run the calculations separately before submitting to the relevant NCA. This will ensure the same calculations will be

## Celebrating 40 Years

applied each time, thereby avoiding the risk of firms inconsistently running the calculations, which would hinder direct comparison between firms. This approach also ensures the data used for the AAR fully aligns with the information reported to TRs under EMIR Art. 9.

It is highly unusual for firms to be required to provide line by line data to NCAs on a Business As Usual basis to enable NCAs to directly audit compliance with one particular regulatory requirement. Typically, we would expect regulated firms to implement an internal process to monitor compliance with all regulatory requirements, investigate control weaknesses and breaks, and to report regulatory breaches to their NCA accordingly. It is then for the NCA to work with the firm to investigate the breach and determine the correct remedies. The firm provides the information necessary for the NCA to check compliance through this mechanism. We do not understand why this standard approach to regulatory compliance is set aside in this one instance.

We recommend that the RTS are amended to require firms to certify if they are above the AA thresholds (clearing threshold condition 2, EUR 6bn threshold, EUR 100bn threshold). This reflects the approach taken in the [ESMA Active Account notification template](#) published on 20 December 2024. At the request of the NCA, firms should provide further information. We would highlight that such an approach would also broadly be in line with certain other EMIR requirements such as how the FC+/- process works, i.e. firms run the calculation annually, if they are below the relevant clearing thresholds they only keep a record; if they are above, they notify the regulator that they are above but without any requirement to provide any detail other than the fact that they are above one or more thresholds, and NCAs can come back and ask for more information if required

We also disagree with the proposal to require third country subsidiaries belonging to a group subject to consolidated supervision in the EU to report on activity and risk exposures. These entities are not required to report under Article 9 of EMIR because they are not EU legal entities and requiring them to report their activities to EU TRs would have an extraterritorial dimension. Similarly, requiring these third country subsidiaries to report on the activity and risk exposures for the purpose of the AAR would have an extraterritorial reach and be very costly and burdensome. This would also seem to be inconsistent with the EMIR 3.0 approach that is that (as noted in paragraph 38 of the CP) *“third country entities that are not subject to the clearing obligation under Union law are not subject to the obligation to maintain an active account.”*

We understand that fields 7-8 in table 1 in Annex II are only relevant where the group is subject to consolidated supervision in accordance with Chapter 2 of Title II of Part One of Regulation (EU) No 575/2013 (CRD). The definition of group should be included in the RTS to make this clear.

**Question 17: 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?**



## Celebrating 40 Years

We do not understand how information on the VM and IM posted by counterparties (for both cleared and uncleared transactions) in aggregate value would help the NCA monitor compliance with the activities and risk exposures of the counterparty. ESMA already have access to notionals in the TR and this additional VM/IM metric is unnecessary and irrelevant. It is also not relevant to the calculation of the exemption thresholds (whether the 85% exemption, EUR 6bn or EUR 100bn).

In addition to not being necessary, it is very unclear what valuable information aggregate VM for cleared transactions would provide. The VM is passed on a daily/intraday basis.

### **Question 18: Do you consider that including reporting on Unique Trade Identifiers (UTIs) would provide valuable information from a supervisory perspective?**

We strongly oppose the reporting of UTIs.

As mentioned in the Impact assessment (section 7.3.3), requiring firms to report the UTI for the relevant derivatives contracts subject to the AAR which were included in the calculation of activities and risk exposures (ESMA preferred policy option – option 2) would “*require counterparties to report additional fields, which would increase the reporting costs and burden*”. As ESMA notes in the CBA the alternative policy option (option 1) would be “*limited to the strict necessary to assess compliance*” but sufficient to assess compliance. Given firms must report UTIs as part of their Article 9 reports and are providing the gross notional amounts it is not clear what the benefit of listing every trade, they have entered into in the last 6 months actually is. We strongly recommend that ESMA’s final rules implement option 1 (i.e. do not require UTIs to be reported).

Paragraph 166 of the consultation explains that including 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*”. As noted in our response to question 16, using the information already at the TRs would be much more efficient in ensuring there is no discrepancy between the data reported to the TRs under Article 9 and the information provided under Article 7b of EMIR.

### **Question 19: Do you agree with the proposed approach for the reporting of the operational conditions?**

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

As noted in our response to question 3, proposed draft RTS Article 2(1)(a) should not, however, require counterparties to “*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*”

## Celebrating 40 Years

any potential legal and operation barriers”[our emphasis added] and we suggest that the underlined text is removed from the final RTS. Draft RTS 8 (1) (b) (ii) should be amended accordingly. The proposed drafting is also available in the Annex.

As noted in our response to question 2, we object to the requirement to have a dedicated staff member in charge of ensuring the propose functioning of the clearing arrangements at all times. Draft RTS 8 (1) (c) (ii) should be amended accordingly. See proposed drafting in the Annex.

In addition, draft RTS Article 8 (2) should be amended to clarify that a client should request the statement from the clearing member in order for the client to transmit it to its NCA. We do not believe that the intention is that the clearing member should transmit the statement to the client’s NCA.

### **Question 20: Do you agree with the proposed approach for the reporting of the representativeness obligation?**

We do not support the proposed approach for the reporting of the representativeness obligation. It is unclear what draft RTS Article 9(1)(b) is intended to show in the context of representativeness.

- Why are the gross and net notional amount cleared in each subcategory (draft Article 9 para 1 subparagraphs b) and c) necessary as the representativeness requirements is based on the concept of the number of trades?
- Should the reference to “*recognised third-country CCP*” (draft Article 9 para 1 subparagraph b) be replaced by “*CCPs of Substantial Systemic Importance*”?

As noted in our response to questions 16 and 18 we do not believe that the reporting of UTIs as proposed in draft RTS Article 9 (1)(e) is necessary to monitor compliance with the representativeness requirement. It does, however, represent a reporting burden/cost.

It is unclear how firms should report to NCAs every 6 months on compliance with the representativeness requirement that should be based on an annual average basis (draft RTS Article 9 (1)(c) refers to average over the past 12 months). In addition, it is unclear how should firms report on compliance with PLN IRS representativeness requirement every 6 months where the reference period for PLN IRS is one year.

### **Question 21: Do you agree with the proposed approach to standardise the reporting arrangements under the active account requirement?**

We support the proposal to address the absence of ITS by providing level 3 guidance. Firms will need sufficient time to understand and implement this ahead of the first reporting deadline, so ESMA should publish this as early as possible in 2025. In line with Level 1, we expected ESMA level 3 guidance to reflect that counterparties below EUR 6bn threshold will not be subject to representativeness and the associated reporting. The Level 3 guidance should be subject to industry

## Celebrating 40 Years

consultation, to ensure a common understanding of requirements by regulators and market participants.

We support the establishment of set dates for the reporting by counterparties to NCAs. However, we strongly recommend that the RTS 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. The reason for a submission window following each calculation period (rather than a specific date on when to report) is because firms will need time to collate the data, perform and validate the calculations, attain internal approvals and any necessary legal sign-off.

With regard to the specific dates to be specified in the RTS, we recommend the reporting date is not set on 1 January due to the end of year holiday. Although this would be less problematic if there is a submission window, we nonetheless recommend instead 1 April and 1 Oct reporting dates (or end of submission window date) based on 1 January and 1 July cut off dates for the calculation periods.

## **Annex 1: Proposed amendments to the Draft RTS**

**This Annex only includes drafting proposal on some recommendations in the ISDA response, mainly:**

- Principle that operational capacity should not include the financial resources of the clearing participant - proposed changes in Article 1, Article 2, Article 3 and the Recitals (4) and (5) and new Recital (6A);
- Amendments to the RTS on operational conditions and stress-testing to 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 – proposed changes in Article 2 and new Article 3A, Recitals 5, new Recital 5A, new Article 3A, reference to Article 26(9)(organisational requirement) of EMIR in the introductory wording at the beginning of the draft RTS.
- How to codify how group consolidated in the EU can meet the AAR – proposed new Article 6A;
- Stress-testing should reflect the principle that it is not a failure or pass test – proposed changes in Article 3 and Recital (5));
- That it is neither plausible nor desirable that EU firms would be able to close thousands of legacy contracts at the Tier 2 CCP and reopen the positions at an EU CCP – proposed amendments to Article 2 and Article 8;
- Requirement that a staff member supports functioning of the clearing arrangements – Article 2.
- Some (not all) amendments to the reporting requirement – Article 8, Article 9, Article 10;

**This Annex does not include any drafting proposals pertaining to the following recommendations:**

- Reporting:
  - o How firms should certify being above certain thresholds and compliant with the AAR;
  - o How to amend RTS Article 8 (2) to clarify that a client should request the statement from the clearing member in order for the client to transmit it to its NCA. We do not believe that the intention is that the clearing member should transmit the statement to the client's NCA;
  - o How to amend RTS Article 10 to specify 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.

**COMMISSION DELEGATED REGULATION (EU) YYYY/XXXX  
of DD MM YYYY  
supplementing Regulation (EU) No 648/2012 of the European Parliament and of the  
Council with regard to regulatory technical standards specifying the operational  
conditions, the representativeness obligation and the reporting requirements of the  
active account requirement  
(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories and in particular the fifth subparagraph of Article 7a(8) **and Article 26(9)** thereof,

Whereas:

(1) Regulation XX amending Regulation (EU) 648/2012 (2) seeks to address the financial stability risks associated with excessive exposures of Union clearing members and clients to Tier 2 CCPs that provide clearing services that have been identified by ESMA as clearing services of substantial systemic importance pursuant to Regulation (EU) 648/2012 by requiring certain financial counterparties and non-financial counterparties to hold active accounts and clear a representative number of transactions at CCPs established in the Union.

(2) In order to ensure that the active account contributes to the overarching objective of reducing excessive exposures to clearing services of substantial systemic importance, this Regulation specifies the operational conditions of the account, the details of the representativeness obligation and the reporting requirements for counterparties subject to the active account requirement.

(3) In order to ensure that the first operational condition is met and that the active account is permanently functional, counterparties should be required to demonstrate that they have established the legal and technical arrangements supporting the provision of clearing services in the relevant derivative contracts with an EU CCP, either directly or via a clearing member. These counterparties should report to their competent authorities the documentation required by EU CCPs, directly or indirectly via their clearing members, as part of their normal due diligence checks and their onboarding procedures when opening new clearing accounts, in order to avoid generating unnecessary costs and burden for the counterparties.

(4) In order to demonstrate that the second and third operational conditions are met and that the counterparties have available systems and resources so that they are operationally able to use the account for large volumes and flows of transactions from positions held at a clearing service of substantial systemic importance and that the account can clear all their new trades, counterparties should be able to demonstrate to the NCA that they have the necessary internal systems and dedicated resources to

## Celebrating 40 Years

monitor their exposures and the internal arrangements to allow them to use the account in case of a large increase in clearing volume, including by assessing any potential legal and operational barriers to this effect. As the accounts are held directly or indirectly at the level of the CCP, the counterparties should request a written statement from the CCP that the account **has the operational capacity to can** withstand a threefold increase in clearing activity, in order to ascertain that the account has the operational capacity to sustain a rapid and important increase of volumes and flows in the relevant derivative contracts from positions held in a clearing service of substantial systemic importance.

(5) In order to demonstrate that the operational conditions have been stress-tested, counterparties should be required to run technical and functional tests on their IT connectivity with the authorised CCP, or with their clearing members and client providing client clearing services. Counterparties should also request a written statement from the CCP, directly or via a clearing member or client providing clearing services, that the account **has the operational capacity to can** withstand a substantial increase of 85% of the total outstanding clearing activity in the relevant derivative contracts within a short timeframe. **The stress-testing exercise should not result in a binary pass or fail determination.** In order to ensure a harmonised approach across EU CCPs, the total outstanding clearing activity in the relevant derivative contracts should be published on an annual basis by ESMA on its website in accordance with Article 6(2) of Regulation (EU) 648/2012. Counterparties with a notional clearing volume outstanding of more than EUR 100 billion should be tested more frequently than less active counterparties, in order to ensure proportionality when stress-testing the operational conditions.

**(5A) EU CCPs should have administrative procedures that enable them to provide written statements to counterparties, on request, that the relevant account has the operational capacity to withstand a threefold increase in clearing activity and to withstand a substantial increase of 85% of the total outstanding clearing activity in the relevant derivative contracts within a short timeframe.**

(6) In the case of client clearing, as the end-client of the clearing account may not be known to the CCP, the written statements should confirm that the client account can withstand the increase in clearing activity and have been stress-tested, regardless of the type of account. The transmission of the written statements to the end-client should be facilitated by the clearing members or the client providing clearing services to the client.

**(6A) In order to demonstrate that the operational conditions are met and that they have been stress-tested, the operational capacity of an account at an EU CCP should not include the financial resources of the clearing participants. Counterparties should not be required to hold financial resources in excess of the financial resources that they are otherwise required to hold (for example, financial resources to meet own funds requirements or the participation requirements of an EU CCP).**

(7) In order to ensure that the active account requirement appropriately contributes to the overarching objective of reducing the excessive exposures to substantially systemic clearing services provided by third-country CCPs and that it is not dormant, certain counterparties should clear a minimum number of trades at an authorised CCP, which are representative of the derivative contracts cleared at the clearing services of substantial systemic importance.

(8) In order to determine the representativeness of those trades, up to three classes of derivative contracts have been selected for each clearing service deemed of substantial systemic importance. The determination of classes of derivatives per clearing service deemed of substantial systemic importance ensures that the accounts opened in the Union are representative, reflect the diversity of portfolios of the counterparties subject to the active account requirement clearing at substantially systemic CCPs and capture a maximum of classes of interest rate derivatives already subject to the clearing obligation. It avoids aggregating classes of derivatives into categories of derivatives which would risk commingling certain derivatives which do not share common and essential characteristics, while at the same time allowing that the related representativeness criteria be better tailored to each specific market, taking into consideration their size, liquidity and growth, as well as the level of activity of each clearing service deemed of substantial systemic importance in comparison to EU CCPs activity. Finally, this determination ensures a more flexible and future-proof approach, able to adapt to market developments and to the degree of systemic importance of third-country CCPs and whether the related financial stability risks for the Union or for one or more of its Member States are sufficiently mitigated.

(9) The ranges of maturities and trade sizes of the most relevant subcategories per classes of derivatives, as well as the number of most relevant subcategories and the durations of the reference period per clearing service deemed of substantial systemic importance, have also been specified taking into account the specific characteristics of each class of derivatives. Counterparties should determine the most relevant subcategories depending on their clearing activity in each class of derivatives subject to the active account, in order to avoid forcing counterparties to clear certain derivative products in the Union, that they do not clear at a clearing service of substantial systemic importance.

(10) In order to ensure that competent authorities have the necessary information to assess compliance with the active account requirement, counterparties should calculate their activities and risk exposures in the relevant categories of derivatives and use the information reported under the reporting obligation. This report should also contain information allowing the competent authority to assess how the counterparties meet the operational conditions and the representativeness obligation of the active account requirement.

(11) Counterparties should report the required information to the competent authority every six months from the entry into force of the Regulation to ensure that the reporting periods do not overlap and can be consolidated to monitor the implementation and the effectiveness of the active requirement at Union level. By derogation, the first report shall cover the period as from which the counterparties become subject to the reporting requirements on the active account up to the next reporting date.

(12) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(13) ESMA has cooperated with the European Banking Authority (EBA), the European Insurance and Occupational Pension Authority (EIOPA) and the European Systemic Risk Board (ESRB) and consulted the members of the European System of Central Banks (ESCB) before submitting the draft technical standards on which this Regulation is based. In accordance with Article 10 of Regulation (EU) No 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) (3), ESMA has conducted open public consultations on such

## Celebrating 40 Years

draft regulatory technical standards, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010,

HAS ADOPTED THIS REGULATION:

### CHAPTER I OPERATIONAL CONDITIONS

#### *Article 1*

#### **Conditions on the IT connectivity, the internal processes and the legal documentation related to the active account**

**1.** In order for the counterparties subject to the obligation set out in Article 7a(1) of Regulation (EU) No 648/2012 to meet the condition referred to in Article 7a(3), point (a), of Regulation (EU) No 648/2012, the counterparties shall establish:

- a) a contractual arrangement with an authorised CCP, a clearing member or a client providing client clearing services in the categories of derivative contracts referred to in Article 7a(6) of Regulation (EU) No 648/2012 at an authorised CCP;
- b) internal policies and procedures to access the clearing services of an authorised CCP, directly or indirectly via a clearing member or a client providing client clearing services;
- c) cash and/or collateral accounts **as required by the authorised CCP or clearing member or client providing client clearing services, with sufficient financial resources to meet the obligations arising from the direct or indirect participation in an authorised CCP; and**
- d) an IT system with connectivity to an authorised CCP, a clearing member or a client providing client clearing services.

**2. None of the conditions referred to in Chapter I of this Regulation shall require counterparties subject to the obligation set out in Article 7a(1) of Regulation (EU) No 648/2012 to hold financial resources in excess of the financial resources that they are otherwise required to hold.**

#### *Article 2*

#### **Conditions on the operational capacity of the counterparty to support a large increase in outstanding and new clearing activity and a large flow of transactions in a short**



**period of time**

1. In order for the counterparties subject to the obligation set out in Article 7a(1) of Regulation (EU) No 648/2012 to meet the conditions referred to in Article 7a(3), points (b) and (c) of Regulation (EU) No 648/2012, the counterparties shall:

a) 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;~~

~~b) appoint at least one staff member with sufficient knowledge to support the proper functioning of the clearing arrangements at all times; and~~

c) **obtain request** 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 referred to in Article 7a(6) of Regulation (EU) No 648/2012.

2. The written statement referred to in paragraph 1, point (c), shall confirm that the increase of clearing activity can take place on both the house and client accounts within one month.

**2A. The operational capacity of the account referred to in paragraph 1, point (c), shall not include the financial resources of the counterparty or, where the counterparty is a client of a clearing member or a client providing client clearing services, the financial resources of the clearing member or the client providing clearing services.**

3. If the counterparty referred to in paragraph 1 is a client of a clearing member or a client providing clearing services connected to an authorised CCP, the counterparty shall request that the written statement referred to in paragraph 1, point (c), for the client account be transmitted by its clearing member or client providing client clearing services where relevant.

*Article 3*

**Stress-testing of the operational conditions of the active account**

1. Counterparties subject to the obligation set out in Article 7a(1) of Regulation (EU)

No 648/2012 shall:

a) conduct technical and functional tests verifying the operational capacity and the functioning of the IT connectivity with the CCP, directly or indirectly, with the clearing member or client providing client clearing services in accordance with Article 1, point (d); and

## Celebrating 40 Years

(b e) request from the authorised CCP, directly or indirectly via a clearing member or a client providing client clearing services, a signed written statement that the account of the counterparty has the **operational** capacity to withstand a substantial increase in outstanding and new clearing activity of up to 85% of the total outstanding clearing activity of the counterparties in the derivative contracts referred to in Article 7a(6) of Regulation (EU) No 648/2012, published on ESMA's website in accordance with Article 6(2) of Regulation (EU) No 648/2012.

2. The increase in clearing activity referred to in paragraph 1, point (b), shall take place on both the house and client accounts within the following time horizons:

- a) five business days for OTC derivatives; and
- b) two business days for financial instruments other than OTC derivatives.

3. The stress-tests referred to in paragraph 1, point (b), shall take place:

- a) annually, for counterparties referred to in paragraph 1, with a notional clearing volume outstanding of less than EUR 100 billion in the derivative contracts subject to the obligation referred to in Article 7a(6) of Regulation (EU) No 648/2012; and
- b) every six months, for counterparties referred to in paragraph 1, with a notional clearing volume outstanding of more than EUR 100 billion in the derivative contracts subject to the obligation referred to in Article 7a(6) of Regulation (EU) No 648/2012.

**3A. The operational capacity of the account referred to in paragraph 1, point (b), shall not include the financial resources of the counterparty or, where the counterparty is a client of a clearing member or a client providing client clearing services, the financial resources of the clearing member or the client providing clearing services.**

**3B. The written statement referred to in paragraph 1, point (b), shall not take the form of a binary pass or fail determination.**

4. If the counterparty referred to in paragraph 1 is a client of a clearing member or a client providing clearing services connected to an authorised CCP, the counterparty shall request that the written statement referred to in paragraph 1, point (b), on the client account be transmitted by its clearing member or client providing client clearing services where relevant.

5. The written statement referred to in paragraph 1, point (b), shall confirm that the stress testing has been run at the same time for all accounts of counterparties referred to in paragraph 1 clearing the derivative contracts subject to the obligation referred to in Article 7a(6) of Regulation (EU) No 648/2012 at the authorised CCP.

**Article 3A**

**Provision of written statements by authorised CCPs**

Upon the request of a counterparty subject to the obligation set out in Article 7a(1) of Regulation (EU) No 648/2012, either directly or indirectly via a clearing member or a client providing client clearing services, an authorised CCP shall, without undue delay and free of charge, provide to that counterparty, clearing member or client providing client services, the written statements referred to in Article 2, paragraph 1, point (c) and Article 3, paragraph 1, point (b) of this Regulation. Upon request, an authorised CCP shall provide such written statements in the English language.

**CHAPTER II**

**REPRESENTATIVENESS OBLIGATION**

*Article 4*

**Representativeness obligation for interest rate OTC derivatives classes in euro**

1. 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, shall clear 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) 2015/220525.

2. For each class of derivatives referred to in paragraph 1, counterparties referred to in paragraph 1 shall identify the five most relevant subcategories in which they clear the most trades at a clearing service of substantial systemic importance pursuant to Article 25(2c) of Regulation (EU) No 648/2012. The five most relevant subcategories shall be selected, for each class of derivatives referred to in paragraph 1, among the subcategories set out respectively in Table 1, Table 2 and Table 3 of Annex I, and over the reference period referred to in paragraph 3.

3. The required minimum number of trades referred to in paragraph 1 shall be calculated based on a duration of the reference period of:

- a) 1 month for counterparties with a notional clearing volume outstanding of more than EUR 100 billion in derivative contracts; and of
- b) 6 months for counterparties with a notional clearing volume outstanding of less than EUR 100 billion in derivative contracts.

*Article 5*

**Representativeness obligation for interest rate OTC derivatives classes**

**in Polish zloty**

## Celebrating 40 Years

1. Counterparties subject to the obligation set out in Article 7a(1) of Regulation (EU) No 648/2012, and clearing interest rate OTC derivatives in Polish zloty, shall clear 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 the most relevant subcategory at an authorised CCP for each class of derivatives in Polish zloty set out in Annex I of Commission Delegated Regulation (EU) 2016/117826.
2. For each class of derivatives referred to in paragraph 1, counterparties referred to in paragraph 1 shall identify the most relevant subcategory in which they clear most trades at a clearing service of substantial systemic importance pursuant to Article 25(2c) of Regulation (EU) No 648/2012. The most relevant subcategory shall be selected for each class of derivatives referred to in paragraph 1 among the subcategories set out respectively in Table 4 and Table 5 of Annex I, and over the reference period referred to in paragraph 3.
3. The required minimum number of trades referred to in paragraph 1 shall be calculated based on a duration of the reference period of 12 months.

### *Article 6*

#### **Representativeness obligation for short-term interest rate derivatives classes in euro**

1. Counterparties subject to the obligation set out in Article 7a(1) of Regulation (EU) No 648/2012, and clearing short-term interest rate derivatives in euro, shall clear 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 four most relevant subcategories at an authorised CCP for each class of derivatives in Table 6 set out in Annex I.
2. For each class of derivatives set out in Table 6 of Annex I, counterparties referred to in paragraph 1 shall identify the four most relevant subcategories in which they clear the most trades at a clearing service of substantial systemic importance pursuant to Article 25(2c) of Regulation (EU) No 648/2012. The four most relevant subcategories shall be selected, for each class of derivatives set out in Table 6 set of Annex I, among the subcategories set out in Table 7 of Annex I for derivatives referencing Euribor over the reference period referred to in paragraph 3 and among the subcategories set out in Table 8 of Annex I for derivatives referencing €STR over the reference period referred to in paragraph 4.
3. The required minimum number of trades referred to in paragraph 1 and referenced in Euribor shall be calculated based on a duration of the reference period of:
  - a) 1 month for counterparties with a notional clearing volume outstanding of more than EUR 100 billion in derivative contracts; and of
  - b) 6 months for counterparties with a notional clearing volume outstanding of less than EUR 100 billion in derivative contracts.
4. The required minimum number of trades referred to in paragraph 1 and referenced in €STR shall be calculated based on a duration of the reference period of:

## Celebrating 40 Years

- a) 6 months for counterparties with a notional clearing volume outstanding of more than EUR 100 billion in derivative contracts; and of
- b) 12 months for counterparties with a notional clearing volume outstanding of less than EUR 100 billion in derivative contracts.

### **Article 6A**

#### **Representativeness obligation for counterparties belonging to a group subject to consolidated supervision in the Union**

**Where counterparties subject to the obligation set out in Article 7a(1) of Regulation (EU) No 648/2012 belong to a group subject to consolidated supervision in the Union:**

- a) the required minimum number of trades referred to in each of Article 4, paragraph 1, Article 5, paragraph 1 and Article 6, paragraph 1 of this Regulation shall apply at the level of that group in accordance with Article 7a(2) of Regulation (EU) No 648/2012; and
- b) those counterparties shall satisfy the condition referred to in Article 7a(3), point (d), of Regulation (EU) No 648/2012 where the aggregate number of trades cleared in one or more active accounts by all entities in that group is at least equal to the required minimum number of trades referred to in point (a).

## **CHAPTER III**

### **REPORTING REQUIREMENTS**

#### *Article 7*

#### **Reporting on aggregate thresholds for assessing compliance with the active account**

1. Counterparties subject to the reporting obligation under Article 7(b) of Regulation (EU) 648/2012, shall report every six months to competent authorities complete and accurate details on the derivatives contracts set outlined in Table 1 and Table 2 of Annex II. Counterparties shall report the details set out in Table 2 on an aggregated basis using the dimensions of the derivatives in Table 3 set out in Annex II.
2. For the purpose of this Article, the information reported under Table 2 set out in Annex II shall be reported at the level of the counterparty. Where the counterparty belongs to a group subject to consolidated supervision in the Union in accordance with Article 7a(2) of Regulation (EU) 648/2012, the information outlined in Table 2 should also be reported at the levels of any subsidiaries, within and outside the EU.

#### *Article 8*

**Reporting on the operational conditions of the active account**

1. Counterparties subject to the obligation set out in Article 7a(1) of Regulation (EU) No 648/2012 shall report every six months to the competent authority the following documentation:

a) a written statement by the counterparty confirming that:

- i. a contractual arrangement has been signed with an authorised CCP or a clearing member or a client supporting the provision of clearing services for the categories of derivative contracts referred to in Article 7a(6) of Regulation (EU) No 648/2012 and, where relevant, a description of any changes to the contractual arrangement since the last report; and
- ii. the IT connectivity with an authorised CCP or a clearing member or client supporting the provision of clearing services is live and operational, and has been tested by technical and functional tests verifying the operational capacity and functioning of the IT connectivity with the CCP, directly or indirectly, with the clearing member or client providing client clearing services in accordance with Article 3;

b) a summary by the counterparty of any material changes since the last report to:

- i. the internal policies and procedures for clearing the derivative contracts referred in Article 7a(6) of Regulation (EU) No 648/2012; and
- ii. 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 or operational barriers to this effect;~~

c) information on:

- i. the account statements for cash and/or collateral, including the number of the account ~~and the aggregate amount of financial resources provisioned; and~~
- ii. ~~the staff member at the counterparty, including the name and contact details, in charge of ensuring the proper functioning of the clearing arrangements at all times;~~

d) a copy of the written statements, signed by the authorised CCP, confirming that the account has:

- i. the operational capacity to support a large increase in outstanding and new clearing activity in a short period of time in accordance with Article 2; and
- ii. has been stress-tested in accordance with Article 3.

2. If the counterparty referred to in paragraph 1 is a client of a clearing member or a client providing clearing services connected to an authorised CCP, the counterparty shall request that the written statements referred to in point (d) paragraph 1 on the client account be transmitted by its clearing member.

*Article 9*

**Reporting on the representativeness obligation**

1. Counterparties subject to the obligation set out in Article 7a(1) of Regulation (EU) No 648/2012 shall report every six months to the competent authority information on:

a. the most relevant subcategories identified by the counterparty for each class of derivative contracts cleared at a clearing service of substantial systemic importance pursuant to Article 25(2c) of Regulation (EU) No 648/2012, and for each reference period, as defined in Articles 4 to 6 of this Regulation;

~~b. the gross and net notional amounts cleared,~~ and the number of trades cleared, in each of the subcategories in accordance with Articles 4 to 6, per class of derivative contracts and per reference period at a recognised third-country CCP;

~~c. the gross and net notional amounts cleared,~~ and the number of trades cleared, based on the average for the 12 previous months, in each subcategory in accordance with Articles 4 to 6 per class of derivative contracts and per reference period at an authorised CCP;

d. the duration of the reference period in accordance with Articles 4 to 6 used for calculating the minimum required number of trades to meet the condition referred to in Article 7a(3), point (d), of Regulation (EU) No 648/2012; and

~~e. a list of Unique Trade Identifiers (UTIs) corresponding to the derivatives in scope of the representativeness criteria, where reported to the trade repositories under Article 9 of Regulation (EU) No 648/2012.~~

2. The counterparty referred to in paragraph 1 shall also report to the competent authority when the number of trades cleared in a subcategory of the derivative contracts referred to in Article 7a(6) of Regulation (EU) No 648/2012 exceeds half of that counterparty's total trades for the previous 12 months.

3. For the purposes of paragraph 1, counterparties should report points (b) and (c) of that paragraph for each class of derivatives using the relevant Tables 1 to 5 and Tables 7 to 8 set out in Annex I, as appropriate.

*Article 10*

**Reporting arrangements from counterparties to competent authorities**

1. Without prejudice to competent authorities requesting more frequent reporting pursuant to paragraph 3 of Article 7b of Regulation (EU) No 648/2012, counterparties shall submit reports to competent authorities on the last day of [January] and on the last day of [July] each year including in each report the information pertaining to the previous 12 months.

2. By derogation from paragraph 1, the first submission of data to competent authorities shall occur on the first reporting date falling no earlier than the six-months from entry into force of this Regulation and include information pertaining to the whole period going from entry into force to the reporting date.

*Article 11*

**Entry into force and application**

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, DD MM YYYY