20 November 2024
ESMA91-1505572268-3964

Reply form

Conditions of the Active Account Requirement

Responding to this paper

ESMA invites comments on all matters in the Consultation Paper and in particular on the specific questions in this reply form. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **27 January 2025.**

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

- Insert your responses to the questions in the Consultation Paper in this reply form.
- Please do not remove tags of the type <ESMA_QUESTION_AAR_1>. Your response to each question has to be framed by the two tags corresponding to the question.
- If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
- When you have drafted your responses, save the reply form according to the following convention: ESMA_AAR_nameofrespondent.

  For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA_AAR_ABCD.
- Upload the Word reply form containing your responses to ESMA’s website (**pdf documents will not be considered except for annexes**). All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your input - Consultations’.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and heading 'Data protection'..

1. General information about respondent

Name of the company / organisation	AFG
Activity	Non-financial counterparty
Are you representing an association?	☒
Country/Region	France

2. Questions

Q1 Are there any aspects of the AAR scope on which ESMA has based its quantitative analysis and its policy choices that ESMA should consider detailing further?

<ESMA_QUESTION_AAR_01>

AFG greatly appreciates the detailed consultation proposed by ESMA on conditions of Emir 3.0 active account requirements. We are happy to contribute with views and recommendations of our membership in regard to ESMA's analysis and the proposed draft RTS.

While ESMA has given a lot of guidance on the scope for AAR, we have further comments and proposals to provide necessary clarifications

Firstly, in relation to the reference periods:

> Regarding the EUR 6bn threshold triggering representativeness obligations, the clarifications brought by the consultation paper are welcome, but we would appreciate clarification on which 12-months period should be used for the first application of EUR 6bn (and the EUR 100 bn thresholds). Our members believe this should be aligned with the period used for the clearing thresholds calculations.
>
> In regard to the 85% exemption, while we welcome the clarification that a percentage has to be applied on aggregate across all the relevant categories of derivatives (point 44), we are concerned about ESMA's current interpretation of reference period used for the 85% exemption under the scope section (point 45).

In order to benefit from the exemption, in-scope counterparties need a transition period to reach the 85% clearing activity threshold. Indeed, shifting out of Tier 2 CCPs would necessarily induce accounting impacts that must be carefully managed, and might take several months.

In addition, determining the 85% by using the '*aggregate month end average positions for the previous twelve months*' is, to our understanding, not an adequate measure because there is no novation or transfer mechanism from one CCP to another. Mechanically, at first stage, the clearing activity at a Tier 2 CCP will increase through closing trades. In practice, for instance, to close a paying IRS at LCH, counterparties need to trade a receiving IRS, then perform a compression and trade the new IRS at Eurex.

We believe that maintaining such interpretation on the 85% exemption would lead to unintended consequences and will be contradictory to the overall objective of the text, being to localise a maximum of euro clearing activity in EU CCPs. Indeed, counterparties that are not already clearing a significant amount of their transactions in an EU CCP would not be able to benefit from the exemption, even though the decision has been taken to relocate their activity. As a result, these counterparties would be severely penalized and forced to meet additional obligations, with associated costs and operational burdens, for a transitional period only: the time needed to obtain the 85% over a twelve-month period.

To be able to use the exemption and at the same time to increase clearing in the EU, the 85% exemption should be based on a more flexible approach. Our members recommend the following proposal:

> "*FC+/NFC+ subject to AAR and wishing to benefit from the exemption shall (i) notify the NCAs/ESMA of their intention do so (as from June 25, 2025), and (ii) would have to demonstrate over the next twelve months (transitional period from June 25, 2025, to June 25, 2026) that the switch is underway at EU CCP(s).*
> *Ultimately, a snapshot of their positions at the end of June 2026 will demonstrate that 85% of their clearing activity is performed at EU CCP(s).*
> *The notification of their intention to benefit the exemption could be accompanied with a commitment/written statement from the counterparties that they will reach the 85% threshold by end of June 2026*."

We believe that such proposal would be in total adequation with the objective of the European Commission to reduce excessive exposure to systemic Tier 2 CCPs.

Secondly, in relation to the active account requirements within a group:

AFG considers that EU entities belonging to a consolidated group (above the 3bn threshold) and which, taken individually, have no clearing activity within in-scope products are not required to open an active account. This was confirmed previously by the European Commission and should be clarified in the final RTS as well. Otherwise, this would be very penalizing for

EU entities, which would have to support very heavy IT developments and operational burdens, while these entities do not trade in-scope products but are captured by the group.

AFG also considers that third-country entities ("TCEs") are not impacted by the AAR, as TCEs are not directly subject to the clearing obligation under EMIR. As the recital 12 of EMIR 3.0 states that "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", it should be clarified that TCEs are not individually subject to AAR when trading in-scope products with EU counterparties.]

<ESMA_QUESTION_AAR_01>

Q2 Do you agree with the above approach for condition (a)? Are there other requirements that ESMA should consider for meeting condition (a)?

<ESMA_QUESTION_AAR_02>

To maintain and ensure attractiveness and competitiveness of EU capital markets we think it is of utmost importance that the draft RTS remains consistent with the Level 1 text to ensure that the regulations do not exceed what is necessary to achieve the intended goals.

We agree with the proposal of Article 1(a), (b) and (d) of the proposed draft RTS. However, upon reviewing the proposed Article 1(c) requirement, we believe that it goes beyond what is necessary to achieve the objective.

Therefore, we strongly recommend that Article 1(c) of the draft RTS to be removed in its entirety.

At a minimum, if the provision under Article 1(c) is retained in some form, we believe that it should be amended to better reflect the distinction between operational and financial capacity. In particular, the phrase "with sufficient financial resources" should be removed. As ESMA correctly points out in point 67 of the consultation paper, operational capacity is distinct from financial resources, and the two should not be conflated. Financial resources are not part of operational conditions of an AA but are part of the clearing relationship itself through clearing limits and margin availability with the relevant clearing member. They need not to be demonstrated under this exercise. Any reference to them in the context of operational conditions creates unnecessary confusion.]

<ESMA_QUESTION_AAR_02>

Q3 Do you agree with the above approach for conditions (b) and (c)?

<ESMA_QUESTION_AAR_03>

AFG is in alignment with ESMA's proposal that a certification provided by the CCP constitutes a simple and efficient approach, provided that a sound and robust framework is in place to support its implementation.

In this regard, we fully support the idea that the certification should be straightforward and easy to understand, while still meeting the necessary regulatory standards

However, in order for this certification process to be truly effective and beneficial, we believe there are several key considerations that could usefully be addressed under a revised draft RTS.

We agree with ESMA that Level 1 provides for counterparties to deliver the certification but believe that the most efficient and less costly way for the whole industry would be to detail in the RTS that counterparties can comply with the obligation by referring to the EUCCP web-site on which the certification has to be made available.

Should the above solution not be possible we would like to highlight necessary supplemental requirements to be addressed under the RTS to ensure that counterparties can comply with the submission obligation It is essential that asset managers and clients are provided with these certifications from EU CCPs and /or their Clearing Members in a timely manner so that they can comply with associatedrequirement.

Furthermore, we strongly advocate for the inclusion of a provision that ensures these certifications are provided at no cost to asset managers or clients. It is critical that the certification process does not create an additional financial burden for those who rely on it.

In addition we would also welcome the inclusion of a standardized template for these certifications at the European level. A standardized template is crucial for ensuring consistency and clarity across different EUCCPs, which may otherwise have varying approaches to providing certifications. By establishing a uniform template, regulators can ensure that all EUCCPs provide the necessary information in a consistent format.,. This will also reduce the potential for confusion or misinterpretation of the information provided, as market participants will be able to rely on a common framework and terminology.

Moreover, the use of a standardized template will help to streamline the certification process itself making it consistent, less costly and burdensome for all EU actors including the EUCCPs. It will also facilitate regulatory oversight, as regulators will have a clearer and more consistent set of data to monitor. and would also help to create a level playing field, ensuring that all market participants are subject to the same standards of information disclosure and transparency.

<ESMA_QUESTION_AAR_03>

Q4 Do you agree with the proposed approach for the annual stress-testing conditions (a), (b) and (c)?

<ESMA_QUESTION_AAR_04>

We consider that stress testing of operational conditions of the AA is essential as long as the associated obligations are fit for purpose.

It is therefore important to recognize that bottlenecks and risks addressed by stress testing in the context of (a), (b) and (c) are not in the camp of clearing clients which have opened an AA. Clearing members and CCPs are the ones involved and confronted to the operational risks that arise in the process of the use of the AA with absorbing in short time frame high volumes of new trades. These entities are the primary actors responsible for ensuring that trades are processed smoothly and that any potential disruptions are managed in a way that prevents broader systemic issues from emerging. As a result, the focus of stress testing should be on the clearing system itself.

Asset managers and their funds and portfolios under management are relying on the provided clearing service.

By placing the responsibility for stress testing with those directly involved in managing operational clearing-related risks, we ensure that the tests are relevant, targeted, and aligned with the actual risks present in the clearing system. This approach would also ensure that resources are used efficiently and that the focus remains on the most critical areas of the financial system.]

<ESMA_QUESTION_AAR_04>

Q5 Do you agree with the differentiated frequency for the stress-testing depending on the counterparties' clearing activities? Would you suggest any other way to take into account the proportionality principle?

<ESMA_QUESTION_AAR_05>

Q6 Do you agree with the proposed classes of derivatives for EUR OTC IRD?

<ESMA_QUESTION_AAR_06>
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Q7 Do you agree with the proposed classes of derivatives for PLN OTC IRD?

<ESMA_QUESTION_AAR_07>
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Q8 Do you agree with the proposed classes of derivatives for EUR STIR?

<ESMA_QUESTION_AAR_08>
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Q9 Do you agree with the proposed maturity and trade size ranges for each class of derivatives in EUR OTC IRD?

<ESMA_QUESTION_AAR_09>
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Q10 Do you agree with the proposed maturity and trade size ranges for each class of derivatives in PLN OTC IRD?

<ESMA_QUESTION_AAR_10>
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<ESMA_QUESTION_AAR_10>

Q11 Do you agree with the proposed maturity and trade size ranges for each class of derivatives in EUR STIR?

<ESMA_QUESTION_AAR_11>
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<ESMA_QUESTION_AAR_11>

Q12 Do you agree with the proposed number of most relevant subcategories for each clearing service of substantial systemic relevance? Do you think this should be set at a more granular level (i.e. per class of derivatives)?

<ESMA_QUESTION_AAR_12>
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<ESMA_QUESTION_AAR_12>

Q13 Do you agree with the proposed reference periods for EUR OTC IRD? Do you think the reference periods should be set at a more granular level (i.e. class of derivatives)?

<ESMA_QUESTION_AAR_13>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_AAR_13>

Q14 Do you agree with the proposed reference period for PLN OTC IRD? Do you think that the reference periods should be set at a more granular level (i.e. class of derivatives)?

<ESMA_QUESTION_AAR_14>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_AAR_14>

Q15 Do you agree with the proposed reference periods for EUR STIR referenced in Euribor? Do you agree with the proposed reference periods for EUR STIR referenced in €STR?

<ESMA_QUESTION_AAR_15>
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<ESMA_QUESTION_AAR_15>

Q16 Do you agree with the proposed approach for the reporting of the activity and risk exposures of the counterparty subject to the active account requirement?

<ESMA_QUESTION_AAR_16>

[Like the wider industry our members are particularly concerned about the reporting requirements as detailed in the proposed draft RTS. We echo the request to stay within the strict limits of what is necessary to demonstrate compliance with AAR and this in the most efficient format and way possible.

More specifically and in regards to the requirement of Article 7 of the draft RTS to be read in conjunction with the details set out in Tables 1-3 of its Annex II we disagree with the approach chosen by ESMA because a large part of required datasets to be reported is either already made available to competent authorities and/or is not relevant for assessing compliance with AAR.

To substantiate our opinion we expressly refer to the detailed analysis conducted with our contribution by EFAMA under their response to this consultation comprising an alternative proposal how required reporting should be designed in the most cost efficient and less burdensome way which our membership fully supports.]

<ESMA_QUESTION_AAR_16>

Q17 Do you consider that including information on margin activity in the AAR reporting requirement would provide valuable information on the activities and risk exposures of the counterparty?

<ESMA_QUESTION_AAR_17>

Reporting aggregate values of Initial Margin (IM) and Variation Margin (VM) appears excessive and provides little additional supervisory value. This would introduce a completely new reporting requirement for management companies, that today do not hold this information in their trading systems. Clearing clients are required to post IM and VM amounts to the CCP via their clearing broker for the underlying funds. However, these amounts are netted and will include margin for other derivative positions, in addition to the designated categories of derivatives. As a result, they would have no means of repurposing or easily extracting this data from existing reporting processes. This creates an unnecessary operational burden without clear justification or added value.]

<ESMA_QUESTION_AAR_17>

Q18 Do you consider that including reporting on Unique Trade Identifiers (UTIs) would provide valuable information from a supervisory perspective?

<ESMA_QUESTION_AAR_18>

We consider that it is not useful to add UTIs to this reporting. This information is already provided to TRs and would be redundant with Article 9 reports. Also, we do not see the value of listing each trade for the supervisory of active accounts.]

<ESMA_QUESTION_AAR_18>

Q19 Do you agree with the proposed approach for the reporting of the operational conditions?

<ESMA_QUESTION_AAR_19>
We propose that Articles 8(1)(b) and 8(1)(c) be removed from the draft RTS, as the provisions are not clear, and introduce unnecessary reporting obligations. The other reporting requirements in Article 8 are already sufficient to meet the Level 1 text's objectives.
The reporting requirement should be limited to confirming that proper clearing arrangements are in place through an authorized EU CCP and its clearing members, who are inherently equipped to deliver the necessary services.
In addition, Article 8(1)(c)(i) introduces a redundant requirement to provide account statements for cash and collateral, including account numbers and aggregate amounts of financial resources provisioned. For management companies, a clearing agreement with a Clearing Member (CM)

already ensures compliance with the EMIR pre-trade clearing certainty requirements. The process of establishing a clearing account automatically involves setting credit lines between the clearing client and the broker, regardless of whether the CCP is based in the EU or a third country. This is a fundamental part of the risk management framework for central clearing.

Furthermore, the requirement in Article 8(1)(c)(ii) to disclose the names and contact details of a specific staff member responsible for ensuring the proper functioning of the relevant processes is not appropriate as the compliance responsibility rests with the company as a whole. Counterparties should instead be required to certify that dedicated teams have been assigned to this role, in line with the procedures they are obligated to establish. Personal contact details are not robust: staff roles change or personnel leave. A shared team email address as an entry point for competent authorities would be a more efficient solution.]

<ESMA_QUESTION_AAR_19>

Q20 Do you agree with the proposed approach for the reporting of the representativeness obligation?

<ESMA_QUESTION_AAR_20>

We strongly question the approach to reporting the representativeness obligation outlined in Article 9 of the draft RTS. Specifically, we do not understand the requirement to report 'gross and net notional amounts cleared' for each subcategory and class of derivatives contracts at a TC CCP (Article 9(1)(b)) and an EU CCP (Article 9(1)(b)).

This information appears to overlap with reporting activities and risk exposures under Article 7b of EMIR, as addressed in Article 7 of the draft RTS. Repeating these requirements adds unnecessary complexity.

We propose a far simpler and more effective approach: Supervisors should focus on gaining clear visibility of the volumes cleared by a counterparty at EU CCPs versus TC CCPs, focusing on gross notional amounts. Counterparties should only be required to report the number of trades in the relevant subcategories cleared at an EU CCP when subject to the representativeness obligation.

This streamlined approach would ensure compliance while avoiding unnecessary duplication and complexity.]

<ESMA_QUESTION_AAR_20>

Q21 Do you agree with the proposed approach to standardise the reporting arrangements under the active account requirement?

<ESMA_QUESTION_AAR_21>

We support the proposal put forward by EFAMA for a single AAR reporting file. This approach would consolidate all the necessary information into one comprehensive document, significantly reducing the potential for errors, duplication, or inconsistencies across different reports.

Besides, as AAR represents new reporting requirements, it is essential that firms are given enough time to implement them.]

<ESMA_QUESTION_AAR_21>