2 February 2024
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Questions and Answers

Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR)

1. Background

1. 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 ("EMIR") entered into force on 16 August 2012. Most of the obligations under EMIR needed to be specified further via regulatory technical standards and they will take effect following the entry into force of the technical standards. On 19 December 2012 the European Commission adopted without modifications the regulatory technical standards developed by ESMA. These technical standards were published in the Official Journal on 23 February 2013 and entered into force on 15 March 2013.

2. The EMIR framework is made up of the following EU legislation:

   (a) 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 ("EMIR");

   (b) Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012;

   (c) Commission Implementing Regulation (EU) No 1248/2012 of 19 December 2012 laying down implementing technical standards with regard to the format of applications for registration of trade repositories according to Regulation (EU) No 648/2012;

   (d) Commission Implementing Regulation (EU) No 1249/2012 of 19 December 2012 laying down implementing technical standards with regard to the format of the records to be maintained by central counterparties according to Regulation (EU) No 648/2012;

   (e) Commission Delegated Regulation (EU) No 148/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories;

   (f) Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP;

   (g) Commission Delegated Regulation (EU) No 150/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 with regard to regulatory technical standards specifying the details of the application for registration as a trade repository;

(h) Commission Delegated Regulation (EU) No 151/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 with regard to regulatory technical standards specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data;

(i) Commission Delegated Regulation (EU) No 152/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 with regard to regulatory technical standards on capital requirements for central counterparties;

(j) Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 with regard to regulatory technical standards on requirements for central counterparties;

(k) Commission Delegated Regulation (EU) No 2017/2155 of 22 September 2017 amending Delegated Regulation (EU) No 149/2013 with regards to regulatory technical standards on indirect clearing arrangements.

3. Regulation (EU) 2019/834[1] amending EMIR, the EMIR Refit, entered into force on 17 June 2019.

4. The European Commission has already released some Frequently Asked Questions on EMIR[2] to clarify the timing and the scope of EMIR, together with certain issues related to third country CCPs and trade repositories.

5. In view of ESMA's statutory role to build a common supervisory culture by promoting common supervisory approaches and practices, ESMA has adopted this Q&As document which relates to the consistent application of EMIR. The first version of this document was published on 20 March 2013, subsequent updates have been published on a regular basis. This document is expected to be updated and expanded as and when appropriate.

2.Purpose

6. The purpose of this document is to promote common supervisory approaches and practices in the application of EMIR. It provides responses to questions posed by the general public, market participants and competent authorities in relation to the practical application of EMIR.

7. The content of this document is aimed at competent authorities under the Regulation to ensure that in their supervisory activities their actions are converging along the lines of the responses adopted by ESMA. It should also help investors and other market participants by providing clarity on the requirements under EMIR.

[1] Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories

[2] http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/emir-faqs_en.pdf

3.Status

8. The Q&A mechanism is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation.[3]

9. Therefore, due to the nature of Q&As, formal consultation on the draft answers is considered unnecessary. However, even if they are not formally consulted on, ESMA may check them with representatives of ESMA's Securities and Markets Stakeholder Group, the relevant Standing Committees' Consultative Working Group or, where specific expertise is needed, with other external parties. In this particular case, considering the date of application of the Regulation and the desirability of providing clarity to the market as soon as possible, ESMA has not engaged in such consultations.

10. ESMA will periodically review these questions and answers to identify if, in a certain area, there is a need to convert some of the material into ESMA Guidelines and recommendations. In such cases, the procedures foreseen under Article 16 of the ESMA Regulation would be followed.

4.Questions and answers

11. This document is intended to be continually edited and updated as and when new questions are received. The date on which each section was last amended is included for ease of reference.

12. Questions on the practical application of any of the EMIR requirements, including the requirements in EMIR's technical standards, may be submit using the following channel to ensure that it will be duly processed:

https://www.esma.europa.eu/questions-and-answers

[3] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC Regulation, 15.12.2010, L331/84.

Acronyms Used

AIF	Alternative Investment Fund
AIFM	Alternative Investment Fund Manager
AIFMD	Alternative Investment Fund Managers Directive (Directive 2011/61/EU)
CCP	Central Counterparty
CSD	Central Securities Depository
CICI	CFTC Interim Compliant Identifier
CT	Clearing Threshold
EMIR	European Market Infrastructures Regulation – Regulation (EU) 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories – "the Regulation"
ESMA	The European Markets and Securities Authority
ETD	Exchange Traded Derivatives
FC	Financial Counterparty
FC+	Financial Counterparty above the clearing threshold, as referred in Article 4a of EMIR
FX	Foreign Exchange
ITS	Implementing Technical Standards
ITS on reporting to TR	Commission Implementing Regulation (EU) No 1247/2012
MiFID	Markets in Financial Instruments Directive – Directive 2004/39/EC of the European Parliament and the Council
MTF	Multilateral Trading Facility
NCA	National Competent Authority
NFC	Non-financial Counterparty
NFC+	Non-financial Counterparty above the clearing threshold, as referred to in Article 10 of EMIR
NFC-	Non-financial Counterparty below the clearing threshold
OTC	Over-the-counter
Q&A	Question and answer
RTS	Regulatory Technical Standards
RTS on OTC Derivatives	Commission Delegated Regulation (EU) No 149/2013
RTS on CCP	Commission Delegated Regulation (EU) No 153/2013
RTS on Third Country contracts	Commission Delegated Regulation (EU) No 285/2014

RTS on IRS in G4 currencies	Commission Delegated Regulation (EU) No 2015/2205
SPV	Special Purpose Vehicle
TR	Trade Repositories
UTI	Unique Transaction Identifier

Table of questions

		Topic of the Question	Relevant Article	Last Updated
General Questions	1	Funds, counterparties	Cross-section	15 July 2019, applicable from 18 June 2020
	2	Principal-to-principal model	Cross-section	5 August 2013
	3	Status of counterparties covered by AIFMD	Cross-section	21 May 2014
	4	Authorised or registered AIFMs	Cross-section	21 May 2014
OTC Questions	1	Definition of OTC Derivatives	Cross-section	2 October 2017
	2	Procedure for FC and NFC to notify that they exceed or no longer exceed clearing thresholds	4a and 10 of EMIR	2 October 2019
	3	Calculation of the clearing threshold	4a and 10 of EMIR	19 November 2021
	4	Responsibility for the status of counterparties	11 of EMIR	2 October 2019
	5	Timely confirmation	12 of the RTS on OTC derivatives	5 August 2013
	6	Intragroup transactions	3, 4(2), 11(6) to 11(10) of EMIR	10 July 2017
	7	Public Register	6 of EMIR	21 May 2014
	8	Reporting of unconfirmed trades for more than 5 business days	12(4) of the RTS on OTC derivatives	20 March 2013
	9	Notional amounts	Cross-section	20 March 2014
	10	Hedging definition	10(3)	19 November 2021
	11	Portfolio Compression	14 of the RTS on OTC derivatives	4 June 2013
	12	Risk Mitigation techniques for OTC derivative contracts not cleared by a CCP	11 of EMIR	20 March 2014
	13	Status of entities not established in the Union	Cross-section	2 October 2019
	14	Portfolio Reconciliation	13 of the RTS on OTC derivatives	20 December 2013
	15	Dispute Resolution	15 of the RTS on OTC derivatives	5 August 2013
	16	Pension Scheme exemption from the clearing obligation	2(10) and 89 of EMIR	31 March 2015
	17	Frontloading requirement for the clearing obligation	Article 4(1)(b)(ii) of EMIR	15 July 2019
	18a	Indirect clearing	Article 4(4) of EMIR and Article 2 RTS on OTC derivatives	11 February 2014
	18b	Indirect clearing	Article 4(2)(b) of RTS 2017/2155 amending RTS 149/2013	14 December 2017
	19	Classification of non-EU Central Banks	1 of EMIR	21 May 2014
	20	Clearing obligation	4 of EMIR	28 May 2019.
	21	Responsibility	2.1 of RTS on Third Country contracts	31 March 2015
	22	Conditions	2.1 of RTS on Third Country contracts	31 March 2015
	23	Effect on existing trades	2 of RTS on Third Country contracts	31 March 2015
	24	Categories of counterparties	2 of RTS on IRS in G4 currencies	2 June 2016
	25	Clearing start date for Categories 3 and 4	4a and 10 of EMIR	28 May 2019, applicable from 17 2024June 2019
CCP Questions	1	Most relevant currencies for the determination of participation in a college	18 of EMIR	20 March 2013

	2	Collateral requirements and recording of client assets	46 of EMIR	20 March 2013
	3	Default management	48 of EMIR	4 February 2016
	4	Deposit of financial instruments	47 of EMIR	5 August 2013
	5	Review of models, Stress-testing and back-testing	49 of EMIR	20 March 2013
	6	Authorisation of a CCP	14 of EMIR	31 March 2015
	7	Capital	16 of EMIR	4 June 2013
	8	Segregation and portability	39 of EMIR	31 March 2015
	9	Margin requirements	41 of EMIR 27(3) of RTS on CCP requirements	3 December 2018
	10	Outsourcing	14 of EMIR 11(1) of RTS on CCP requirements	4 June 2013
	11	Investment Policy	47 of EMIR	11 February 2014
	12	Default Fund	42 of EMIR	11 February 2014
	13	Organisational requirements	26 of EMIR	21 May 2014
	14	Definitions	2 of EMIR	5 August 2013
	15	Allocation of additional resources	35 of RTS on CCP requirements	5 August 2013
	16	Transparency	38 of EMIR	11 February 2014
	17	Limited exposures of Clearing Members	43(3) and 48(2) of EMIR	11 February 2014
	18	Use of margins posted by non-defaulted Clearing Members	45(4) of EMIR	11 February 2014
	19	Application of the exemptions to Title IV of EMIR	1 of EMIR	11 February 2014
	20	Risk Committee	28 of EMIR	21 May 2014
	21	Prudential Requirements	Guideline and Recommendation 3(b)(v)	21 May 2014
	22	Ongoing monitoring of collateral requirements	46 of EMIR and 37 of RTS on CCP requirements	2 October 2017
	23	Access Model	2 of EMIR	7 January 2020
TR Questions	1	Classification of financial instruments	1 of EMIR	24 September 2020
	2	TR registration	56 of EMIR	20 March 2013
	3a	Reporting of collateral	9 of EMIR	14 December 2017
	3b	Reporting of valuations	9 of EMIR	21 September 2021
	4	Reporting of outstanding positions following the entry into force of EMIR (Backloading)	5 of the ITS on reporting to TR	15 July 2019
	5	Exchange traded derivatives	9 of EMIR	4 June 2013
	6	Reporting to TRs: Cleared trades	9 of EMIR	29 May 2018
	7	Reporting to TRs: Avoidance of duplication	9 of EMIR	15 July 2019
	8	Reporting to TRs: delegation	9 of EMIR	4 June 2013
	9	Reporting to TRs: Table of fields	9 of EMIR	23 March 2023
	10	Codes	9 of EMIR	24 October 2014
	11	Frequency of reports	9 of EMIR	8 July 2020
	12	Field “Maturity”	9 of EMIR	29 May 2018
	13	Intragroup transactions	9 of EMIR	15 July 2019
	14	Transactions within the same legal entity	9 of EMIR	2 Octobre 2019

15	Subsidiaries of non-EU entities	9 of EMIR	5 August 2013
16	Collateral portfolio code	9 of EMIR	20 December 2013
17	Position level reporting	9 of EMIR	2 Octobre 2019
18	Reporting to TRs: UTI construction	9 of EMIR	11 February 2014
19	Reporting to TRs: UTI generation	9 of EMIR	29 May 2018
20a	Reporting to TRs: Empty fields	9 of EMIR	27 April 2015
20b	Reporting to TRs: Validations of EMIR reports	9 of EMIR	27 April 2015
21	Reporting to TRs: UPI taxonomy	9 of EMIR	29 May 2018
22	Reporting to TRs: Venues with AII codes	9 of EMIR	29 May 2018
23	Reporting to TRs: AII code	9 of EMIR	29 May 2018
24	Reporting to TRs: Buy/Sell indicator for swaps	9 of EMIR	14 December 2017
25	Reporting to TRs: Decimal values in fields 15 and 16	9 of EMIR	29 May 2018
26	Reporting to TRs: Complex Contracts	9 of EMIR	11 February 2014
27	Reporting to TRs: 'Leg 1' and 'Leg 2' fields	9 of EMIR	11 February 2014
28	Reporting to TRs: Underlying field	9 of EMIR	29 May 2018
29	Reporting to TRs: Field 15 for NFC	9 of EMIR	20 March 2014
30	Reporting to TRs: MIC codes	9 of EMIR	20 March 2014
31	Reporting to TRs: Exchange rate	9 of EMIR	29 May 2018
32	Reporting valuations of swaps on structured products	9 of EMIR	23 June 2014
33	Collateralisation field	9 of EMIR	29 May 2018
34	Contracts with no maturity date	9 of EMIR	4 February 2019
35	Notional Amount field	9 of EMIR	29 May 2018
36	OTC Derivatives Novations	9 of EMIR	28 May 2019
37	Access to Data by the authorities	81 of EMIR	20 May 2021
38	Trades terminated before reporting deadline	9 of EMIR	4 February 2019
39	Block trades and allocations	9 of EMIR	24 October 2014, applicable until 17 June 2020
39	Block trades and allocations	9 of EMIR	15 July 2019, applicable from 18 June 2020
40	LEI changes due to mergers and acquisitions. Update of identification code to LEI	9 of EMIR	21 September 2021
41	Reporting of notional in position reports	9 of EMIR	4 February 2016
42	Population of the field Clearing Obligation	9 of EMIR	28 May 2019
43	Trades cleared by clearing house which is not a CCP	9 of EMIR	26 July 2016
44	Transition to the new EMIR TS on reporting	9 of EMIR	15 July 2019
45	Operational aspects of data access	81 of EMIR	05 February 2018
46	Reporting of energy derivatives	9 of EMIR	29 May 2018
47	Reporting of deliverable currencies	9 of EMIR	29 May 2018
48	Reporting of Effective date	9 of EMIR	29 May 2018

	49	Reporting of FX Swaps	9 of EMIR	26 September 2018, applicable from 26 September 2019
	50	Reporting of Confirmation Means	9 of EMIR	4 February 2019
	51	Reporting obligation	Article 9(1) of EMIR	31 March 2021
	52	Notional amount field for credit index derivatives	9 of EMIR	15 July 2019
	53	Reporting of reference rates not included in Regulation (EU) 2017/105	9 of EMIR	20 May 2021
	54	Reporting of OTC derivative contracts by the FC on behalf of the NFC- pursuant to the Article 9(1a) of EMIR as amended by EMIR REFIT	9 of EMIR	28 May 2020
	55	Reporting of reference entity for credit derivatives	9 of EMIR	24 September 2020
	56	Correct population of fields "Execution timestamp", "Effective date" and "Settlement date" for Forward Rate Agreements	9 of EMIR	24 September 2020
	57	Procedure for terminating 'dead trades' by TRs	9 of EMIR	28 January 2021
	58	Reporting of the field 'Delivery type' for Credit derivatives	9 of EMIR	20 May 2021
	59	Inclusion of derivatives in the Trade State Report (TSR)	9 of EMIR	23 March 2023
OTC Reporting Scenario	1	Reporting to TRs – Transaction scenarios	9 of EMIR	21 December 2020
ETD Reporting questions	1	Scope of reporting	9 of EMIR	21 December 2020
	2	***amended*** Which parties have to report	9 of EMIR	26 January 2024
	3	How should give-ups be reported	9 of EMIR	20 December 2013
	4	Do Partial executions have to be reported separately	9 of EMIR	20 December 2013
	5	Trade ID and Transaction Reference Number	9 of EMIR	20 December 2013
	6	How should time stamps be populated	9 of EMIR	20 December 2013
	7	Who should report the value of collateral	9 of EMIR	20 December 2013

General Questions

General Question 1: Funds, counterparties [last update 15 July 2019, this version shall apply from 18 June 2020].

(a) *Should the funds (e.g. UCITs, AIF, unincorporated funds, IORP) be considered as the counterparty to a derivative transaction in the context of EMIR, or should it be the fund manager[4]?*

(b) *Do entities with a charitable nature or otherwise a non-profit profile have to report under EMIR?*

(c) *Should an umbrella fund that is a UCITS or an AIF be considered as the counterparty to a derivative transaction in the context of EMIR, or should the sub-funds thereof be considered as the counterparties?*

General Answer 1:

(a) The counterparty to the derivative transaction is generally the fund. When a fund manager executes a transaction for different funds at the same time (e.g. block trade), it should immediately allocate the relevant part of that transaction to the relevant funds and report accordingly. In rare circumstances, the fund manager executes trades on its own account and not on behalf of the funds it manages, in this last case the counterparty would be the fund manager. When the counterparty to the derivative transaction is the fund, it has the following consequences:

1. When the Regulation refers to a number of trade or to a threshold, this should be assessed at the level of the fund (or in case of umbrella funds, at the level of the sub-fund), and not at the level of the fund manager. It will be the case for example to assess the frequency of portfolio reconciliation or the scope of the portfolio compression requirement.

2. For the purpose of the reporting to TRs, the counterparty ID should be the ID of the fund, not the ID of the fund manager. According to Articles 9(1b) to (1d) EMIR, the fund manager must report to TRs on behalf of the funds. The ID of the fund manager shall be provided as the report submitting entity ID.

3. When a management company provides the service of portfolio management (as defined in Article 4(9) of MiFID) to a client, and, by doing so, enters into derivative contracts, the client should be considered as the counterparty to the derivative, except when the

[4] The reference to fund manager here covers the UCITSs management company, the AIFM and the authorised entity that is responsible for managing and acting on behalf of an IORP

management company bears the risk of the derivative contract and therefore is to be considered the counterparty. The management company can report to TRs on behalf of the clients without prejudice to the client's liability for meeting the reporting obligation. In that situation, the ID of the management company must be provided as the report submitting entity ID (for the two situations covered by this scenario, please refer to Case 4 Counterparties in the context of portfolio management).

(b) If the activity performed by the entity with a charitable nature or otherwise a non-profit profile falls under the definition of economic activity that qualifies it as an undertaking (see European Commission FAQ no. 14), the charity or non-profit entity would be subject to the obligations applicable to non-financial counterparties for the derivatives transactions concluded, including the reporting obligation.

(c) If the derivative contract is concluded at the level of the sub-fund, the counterparty should be the sub-fund and not the umbrella fund. In that case, the sub-fund needs to have an LEI for reporting purposes and be identified as the counterparty.

Otherwise, the umbrella fund should have an LEI for reporting purposes and be identified as the counterparty. The sub fund should be identified as the beneficiary.

General Question 2: Principal-to-principal model [Last update: 5 August 2013]

In a number of jurisdictions, the principal-to-principal model of OTC derivative client clearing involves the creation of a distinct legal contract between the clearing member and its client (a 'back-to-back contract') in addition to the legal contract that exists between the CCP and the clearing member. The back-to-back contract exists in order to pass the legal and economic effects of the cleared transaction onto the client.

Where the back-to-back contract falls into the definition of an OTC derivative contract under Article 2 of EMIR then is the back-to-back contract an uncleared OTC derivative contract for the purposes of EMIR (e.g. subject itself to the clearing obligation or risk mitigation techniques)?

General Answer 2:

In those jurisdictions in which the principal-to-principal model exists, the back-to-back contract is an integral part of the overall principal-to-principal model of OTC derivative client clearing. While it is a distinct legal contract from that to which the CCP is a counterparty, it does comprise one leg of the overall client clearing arrangement and exists solely to pass the legal and economic effects of CCP clearing onto the client.

Article 4(3) of EMIR provides that 'for … [the] purpose … [of meeting the clearing obligation] a counterparty shall become … a client'. Where a counterparty to an OTC derivative contract has become a client (as foreseen in Article 4(3) of EMIR), the OTC derivative contract has been submitted to CCP clearing, and the CCP has recorded the OTC derivative trade in an individually segregated or omnibus client account), then the client is considered to have fulfilled all of its clearing obligations under EMIR in respect of both the original OTC derivative contract and in respect of any other legal contract which is created as part of the operational mechanics of the client clearing process (i.e. the back-to-back contract).

Because the back-to-back contract is considered to have been cleared (in the context of Article 4 of EMIR), then the risk mitigation techniques for OTC derivative contracts not cleared by a CCP would not apply.

General Question 3: Status of counterparties covered by AIFMD [last update 21 May 2014]

What is the status of the following counterparties under EMIR?

i. *EU AIFs and non-EU AIFs referred to in Article 61(3) of AIFMD (i.e. closed-ended AIFs that do not make any investments after 22 July 2013) and in Article 61(4) of AIFMD (i.e. closed-ended AIFs whose subscription period had closed prior to entry into force of AIFMD) that are managed by AIFMs that are exempt from authorisation due to the provisions of Article 61(3) and (4).*

ii. *AIFs referred to in Article 61(3) of AIFMD (i.e. closed-ended AIFs that do not make any investments after 22 July 2013) and in Article 61(4) of AIFMD (i.e. closed-ended AIFs whose subscription period had closed prior to entry into force of AIFMD) that are managed by AIFMs authorised or registered under AIFMD because they also manage other types of AIF.*

iii. *Securitisation special purpose entities referred to in Article 2(3)(g) of AIFMD.*

iv. *Special purpose vehicle (SPVs) created by real estate and private equity AIFs.*

General Answer 3

i. These EU AIFs should be classified as non-financial counterparties and these non-EU AIFs should be classified as third country entities.

ii. These AIFs should be classified as financial counterparties. Under Article 2(8) of EMIR, the definition of a financial counterparty includes “an alternative investment fund managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU”. Therefore, if a fund is an AIF and is under the management of an authorised or registered AIFM, then it falls within the scope of EMIR as a financial counterparty.

iii. AIFMD does not apply to the entities listed in Article 2(3) of this Directive, hence “securitisation special purpose entities” referred to in Article 2(3)(g) of AIFMD should not be considered as “AIFs managed by AIFMs authorised or registered in accordance with AIFMD”. Therefore, they do not meet the definition of financial counterparties and should be considered as non-financial counterparties (NFCs) for the purpose of EMIR.

iv. AIFs may hold 100% of the shares of SPVs, whose purpose is to purchase, hold or administrate undertakings. This type of structure is particular common for private equity AIFs and real estate AIFs. The OTC derivative contracts concluded for the activity of the AIFs are concluded at the level of these SPVs. SPVs are non-financial counterparties under EMIR if they do not meet the criteria set out in the definition of financial counterparty under Article 2(8) of EMIR. Those SPVs need to comply with the rules and obligations for non-financial counterparties under EMIR.

General Question 4: Authorised or registered AIFMs [last update 21 May 2014]

The definition of a financial counterparty provided in Article 2(8) of EMIR includes AIFs which are managed by authorised or registered AIFMs. Which entities does the definition exactly cover?

General Answer 4

The definition of a financial counterparty should be understood as covering the following entities:

1. EU AIFs managed by authorised EU AIFMs.
2. EU AIFs managed by registered EU AIFMs.
3. Non-EU AIFs managed by authorised EU AIFMs.
4. Non-EU AIFs managed by registered EU AIFMs.
5. EU AIFs managed by authorised non-EU AIFMs (subject to extension of the passport).
6. Non-EU AIFs managed by authorised non-EU AIFMs (subject to extension of the passport).

Non-EU AIFs marketed in the Union by non-EU AIFMs (both below and above the thresholds of Article 3(2) of the AIFMD) under Article 42 of the AIFMD should be considered as third-country entities because they are neither undertakings established in the Union nor are they managed by authorised or registered AIFMs. EU AIFs marketed in the Union without a passport by non-EU AIFMs (both below and above the thresholds of Article 3(2) of the AIFMD) under Article 42 of the AIFMD should be considered as non-financial counterparties because they are undertakings established in the Union and they are not managed by authorised or registered AIFMs.

Part I: OTC Derivatives

Last update: 2 October 2019

OTC Question 1 [last update 21 December 2020]

Definition of OTC derivatives

The definition of OTC derivatives is provided for in EMIR Article 2 and is relevant for a number of provisions in EMIR, including the positions of OTC derivatives that an NFC shall calculate for the purpose of determining whether it has reached a clearing threshold (Article 10), and the OTC derivative classes that NCAs shall notify to ESMA (Article 5). Should the following be considered OTC derivatives?

- *(a) derivative contracts traded on MTFs or OTFs;*
- *(b) derivative contracts which are not executed on a regulated market, but which share the same characteristics as exchange traded derivatives, so that once cleared they become fungible with ETD;*

(c) *derivative contracts executed on third-country markets;*

(d) *derivatives contracts executed outside a regulated market, but processed by an exchange and cleared by a CCP;*

(e) *What is the status under EMIR of derivative contracts that were executed in a regulated market in the United Kingdom (UK), if this market becomes a third country market not considered to be equivalent to a regulated market?*

OTC Answer 1

The definition of OTC derivatives provided for in Article 2 of EMIR is the following: 'OTC derivative' or 'OTC derivative contract' means a derivative contract the execution of which does not take place on a regulated market as within the meaning of Article 4(1)(14) of Directive 2004/39/EC or on a third- country market considered as equivalent to a regulated market in accordance with Article 19(6) of Directive 2004/39/EC. Consequently:

(a) Derivative contracts traded on MTFs or OTFs are OTC derivatives in the context of EMIR.

(b) The definition explicitly refers to the place of execution ("a derivative contract **the execution of which** does not take place on a regulated market"). The characteristics that these contracts have in common with exchange traded derivatives are therefore not relevant for the purpose of the definition of OTC derivatives.

(c) Derivative contracts executed on a third-country market which has been considered to be equivalent to an EU regulated market by the European Commission in accordance with Article 2a of EMIR, are not OTC derivatives under EMIR and do not count for the purpose of the determination of the clearing threshold under Article 10 of EMIR.

However, derivative contracts executed on third-country markets which have not been considered to be equivalent to an EU regulated market, will count for the determination of the clearing threshold.

Article 2a states that the European Commission shall publish a list of those markets that are to be considered to be equivalent. ESMA maintains on its website[5] a consolidated list of third-country markets that have been considered to be equivalent to an EU regulated market for the purpose of the OTC derivative definition under EMIR.

(d) Derivatives transactions, such as block trades, which are executed outside the trading platform of the regulated market, but are subject to the rules of the regulated market and are executed in compliance with those rules, including the immediate processing by the regulated market after execution and the clearing by a CCP, should not be regarded as OTC derivatives transactions. Therefore, these transactions should not be considered for the purpose of the clearing obligation and the calculation of the clearing threshold by NFC that only relates to OTC derivatives.

[5] https://www.esma.europa.eu/sites/default/files/library/equivalent_tc-markets_under_emir.pdf

Derivatives transactions that do not meet the conditions listed in the first paragraph of this sub-answer (d) should be considered OTC. For example, derivatives contracts that are not executed on a regulated market and are not governed by the rules of an exchange at the point of execution should be considered OTC even if after execution they are exchanged for contracts traded in a regulated market. However, the replacement contract itself may be considered exchange traded if it meets the relevant conditions.

(e) New derivative contracts, the execution of which takes place in a UK market after such market has become a third country market not considered to be equivalent to a regulated market (according to Article 2a of EMIR), are considered OTC derivative contracts under Article 2(7) of EMIR.

However, outstanding derivative contracts, the execution of which took place in a UK regulated market that was not yet a third country market at the time of execution do not fall in the definition of OTC derivatives under EMIR.

OTC Question 2 [last update 2 October 2019]

Articles 4a and 10 of EMIR – Procedure for FCs and NFCs to notify that they exceed/cease to exceed the clearing thresholds

(a) When do counterparties have to calculate the clearing thresholds and notify the relevant NCAs and ESMA they have exceeded the clearing thresholds?

(b) When a counterparty has notified the relevant NCAs and ESMA that its aggregate month-end average position no longer exceeds the clearing thresholds, on which date should the next calculation of the clearing thresholds be made?

(c) Should all entities of the group that are above the clearing thresholds notify the relevant NCAs and ESMA, or should there be a single notification per group?

(d) What should be the procedure for counterparties that had notified the relevant NCAs and ESMA that they were above the clearing thresholds on the basis of certain assumptions, but are in fact below the clearing thresholds on the basis of amended and correct assumptions?

(e) What should happen if a counterparty notifies the relevant NCAs and ESMA (in the case it is above the clearing thresholds or when it has not conducted the calculation) and during the 4-month period before having to clear it is able to demonstrate that it is not or no longer above the clearing thresholds?

(f) Do counterparties that are exempted under Article 1(4) and Article 1(5) need to calculate their positions and/or notify ESMA and the relevant NCAs?

(g) Do Pension Scheme Arrangements, which are temporarily exempted from the clearing obligation, need to calculate their positions or notify ESMA and the relevant NCAs?

(h) *When do counterparties that start taking positions in OTC derivatives only after the entry into force of Refit have to calculate the clearing thresholds and notify the relevant NCAs and ESMA that they have exceeded the clearing thresholds the first time?*

OTC Answer 2

(a) FCs and NFCs taking positions in OTC derivative contracts and choosing to calculate their aggregate month-end average position for the previous 12 months, would need to determine the results of that calculation on the day Regulation 2019/834 amending EMIR (Refit) enters into force.

On the day of entry into force of Refit, FCs and NFCs who exceed the clearing thresholds (being referred to as FCs+ and NFCs+) or who choose not to calculate their positions (also considered and referred to as FCs+ and NFCs+), as per Article 4a(1)(a) and Article 10(1)(a), will have to notify ESMA and the relevant NCAs.

This is also applicable to FCs+ and NFCs+ that were already subject to the clearing obligation prior to the entry into force of Refit (i.e. Category 1, 2 and 4 counterparties as defined in the Commission Delegated Regulations on the clearing obligation, and thus also including NFCs+ that have previously notified ESMA and their relevant NCAs that they exceeded the clearing thresholds).

From that point on, FCs and NFCs taking positions in OTC derivative contracts and choosing to calculate their aggregate month-end average position should conduct that calculation every 12 months. From that point on also, FCs and NFCs taking positions in OTC derivative contracts and choosing to calculate their aggregate month-end average position do not need to notify again ESMA and the relevant NCAs when the results of that calculation do not change, i.e. the FCs and NFCs that the entities of the group do not start to exceed or do not cease to exceed the clearing thresholds. Similarly, FCs and NFCs taking positions in OTC derivative contracts, who chose on the day of entry into force of Refit not to calculate their aggregate month-end average position and notified ESMA and the relevant NCAs accordingly, and who choose to continue not calculating their aggregate month-end average position, do not need to notify again ESMA and the relevant NCAs. However, FCs and NFCs taking positions in OTC derivative contracts who did not notify ESMA and the relevant NCAs on the day of entry into force of Refit because they were below the thresholds, and who choose 12 months later or going forward not to calculate, should notify ESMA and the relevant NCAs as this would constitute a change of their status (from FC- to FC+ or from NFC- to NFC+ respectively).

A counterparty above the clearing thresholds can demonstrate at any time to the relevant NCAs that it no longer exceeds the clearing thresholds, in accordance with Article 4a(2) and Article10(2) for FCs and NFCs respectively, and should notify ESMA and the relevant NCAs accordingly.

(b) According to Article 4a(1) and Article 10(a)(1), a counterparty that has notified ESMA and the relevant NCAs that it is no longer above the clearing thresholds should decide 12 months later whether to re-calculate its positions. If the counterparty decides to re-calculate and this calculation is above the clearing thresholds, or if the counterparty chooses not to conduct this calculation, then the counterparty will need to notify ESMA and the relevant NCAs immediately. If the counterparty decides to re-calculate and it remains below the clearing thresholds, then it is not required to re-notify ESMA and the relevant NCAs that it remains below the clearing thresholds.

(c) For each Member State in which the group has entities which trade OTC derivatives, a single notification should be submitted to each relevant NCA once these entities have exceeded or cease to exceed the clearing thresholds or if they choose not to calculate their positions.

For the purpose of Article 4a of EMIR, this notification should include, among other information, the names of all the entities of the group that are within the EU and which trade OTC derivatives, specifying if they are FCs or NFCs.

For the purpose of Article 10 of EMIR, this notification should include, among other information, the names of all the entities of the group that are NFCs and which trade OTC derivatives.

The group should also submit a single notification to ESMA, listing all the FCs and NFCs accordingly. For that purpose, counterparties need to fill in the notification form that can be found on ESMA's website (https://www.esma.europa.eu/clearing-thresholds).

It should be considered that due to the different computation methodologies for the positions of FCs and NFCs, it is possible that within the same group, FCs are above the clearing thresholds, while NFCs are below.

(d) When the clearing thresholds are not (and would not have been) exceeded if the counterparty had applied from the beginning the correct assumptions for the calculation of the clearing thresholds, the counterparty should inform the relevant NCAs and ESMA of this fact. The counterparty will be regarded as a counterparty below the thresholds for past and future obligations.

(e) If a counterparty notifies ESMA and the relevant NCAs that it is above the clearing thresholds or that it has not calculated its positions against the clearing thresholds, it will become subject to the clearing obligation and will have to start clearing OTC derivative contracts (pertaining to a class of OTC derivatives which is subject to the clearing obligation) entered into or novated more than 4 months following such notification (i.e. entered into or novated on the first day following the end of this 4-month period or afterwards, for instance; for a notification on 15 January, the trades entered into or novated on 16 May or afterwards). If during this 4-month period, the counterparty demonstrates in accordance with Article 4a(2) and Article10(2) of EMIR for FCs and NFCs respectively to the relevant NCAs that it is below the clearing thresholds and notifies ESMA and the relevant NCAs accordingly, it will no longer be subject to the clearing obligation and will not have to start clearing at the end of the 4-month period.

(f) Counterparties that are not subject to EMIR as per Article 1(4) and Article 1(5), do not have to calculate their positions nor notify ESMA and the relevant NCAs.

(g) Pension Scheme Arrangements do not need to calculate their positions nor notify ESMA and the relevant NCAs as long as they benefit from a temporary exemption from the clearing obligation.

(h) Counterparties which start taking positions in OTC derivative contracts (because they are newly created entities or because they did not take positions in OTC derivative contracts before) and which choose to calculate their aggregate month-end average position for the previous 12 months, would need to determine the results of that calculation 12 months after they start taking positions in OTC derivative contracts. On that day, these counterparties who exceed the clearing thresholds or who choose not to calculate their positions will have to notify ESMA and the relevant NCAs immediately.

OTC Question 3 [last update 19 November 2021]

Articles 4a and 10 of EMIR, as amended by Regulation 2019/834 – Calculation of positions for the clearing thresholds

(a) *How should a counterparty perform the calculation of its aggregate month-end average position for the previous 12 months to determine whether it is above or below the clearing thresholds?*

(b) *When the notional amount of a derivative contract is subject to modifications (e.g. a reduction/increase of the notional at fixed dates), should the updated notional amount be taken into account for the purpose of calculating the clearing thresholds?*

(c) *When counting a contract denominated in a currency other than Euro, does the conversion to euro have to be done monthly to reflect exchange rate fluctuation?*

(d) *Should the following OTC derivative transactions be counted against the clearing thresholds:*

1. *intragroup transactions between two non-financial counterparties*
2. *contracts which are cleared on a voluntary basis*
3. *positions taken by a third-country counterparty in the same group as an EU non-financial counterparty*
4. *positions taken by a third-country counterparty in the same group as an EU financial counterparty*
5. *positions taken by jointly controlled entities or entities accounted for under the equity method?*

(e) *How an intragroup transaction and the corresponding external transaction are counted against the clearing thresholds in a non-financial group?*

(f) *When calculating positions in OTC derivatives to be compared to the values of the clearing thresholds, are counterparties allowed to take into account any netting effect?*

(g) *How should the calculation of the "aggregate month-end average position for the previous 12 months" be applied when the calculation takes place right after a month end?*

(h) *When a financial counterparty calculates its positions for the purpose of the clearing threshold determination in accordance with Article 4a(3) of EMIR, should it include in the calculation the OTC derivative contracts that are objectively measurable as reducing risks directly relating to* *the commercial activity or treasury financing activity entered into by the non-financial counterparties that are part of the same group?*

OTC Answer 3

(a) In order to determine whether counterparties are above or below the clearing thresholds, they are required to perform the calculation of their aggregate month-end average position in OTC derivatives for the previous 12 months. To do this, counterparties need to:

1. determine their total position for each OTC derivative asset class on the last day of each of the previous 12 months. This should be done in accordance with the calculation rules in Article 4a(3) or Article 10(3) of EMIR respectively, depending on whether a counterparty is an FC or an NFC;
2. conduct the calculations referred to in (i) for each entity in their group. Following this, aggregate for each OTC derivative asset-class each month-end position for each group entity to find the aggregate figure for each asset class at group level. This should be done in accordance with the rules in Article 4a(3) or Article 10(3) of EMIR for FCs and NFCs respectively and which specify which entities and which OTC derivative contracts to include;
3. find the average of the total amount across the 12 months by dividing that number by 12 for each asset class; and
4. compare the resulting number for each asset class with the relevant clearing threshold to determine whether the amount exceeds the relevant clearing threshold for any of the asset classes.
5. Please also refer to other Q&As in this document for further details on how to conduct the calculation in specific cases.

(b) Yes, the updated notional amount should be taken into account when calculating each month-end average position for the purpose of calculating the total position to be compared to the clearing thresholds.

(c) Counterparties are expected to use the applicable exchange rate for each of the relevant month-ends when they calculate the total position to be compared to the clearing thresholds.

(d) (1) For the purpose of the calculation of positions of an NFC against the clearing thresholds:

- If two NFCs belonging to the same group enter into an intragroup transaction with each other, which does not fall within the hedging definition6, both sides of the transaction should be counted. The total contribution to the group-level threshold calculation would therefore be twice the notional of the contract.
- If two NFCs enter into a hedging transaction, none of the sides should be counted.

[6] As determined under Article 10 of Commission Delegated Regulation (EU) No 149/2013 (ESMA RTS on OTC derivatives)

(d) (2) OTC contracts cleared on a voluntary basis are included in the calculation of the clearing thresholds. According to Article 4a(3) and Article 10(3) of EMIR, OTC derivatives are to be included regardless of whether they are cleared or not.

(d) (3) Positions taken by third-country counterparties in the same group as the EU NFC, which would be considered NFCs if they were in the EU, count for the calculation of the clearing thresholds. The group to which the EU NFC belongs includes subsidiaries, sisters and parent companies wherever the ultimate parent company is established.

(d) (4) Positions taken by third-country counterparties in the same group as the EU FC, which would be considered FCs or NFCs if they were in the EU, count for the calculation of the clearing thresholds. The group to which the EU FC belongs includes subsidiaries, sisters and parent companies wherever the ultimate parent company is established.

(d) (5) If the group in question is a group under Directive 2006/48/EC or Directive 2006/49/EC, only positions of fully consolidated subsidiaries should be considered for the purpose of the calculation. On the contrary, if the group in question is a group under Directive 83/349/EEC, then positions of entities that are not fully consolidated may also be taken into consideration for the purpose of the calculation.

(e) In a non-financial group, typically there is one, or more, entity that is specialised in dealing in derivatives with entities outside the group (the trading entity). This trading entity enters into external derivative contracts which, to the maximum possible extent, mirror one or more derivative contracts with entities within the group.

For the purpose of calculating positions to be compared to the clearing thresholds, where the derivative contracts concluded by an NFC in the group that is not the trading entity, qualify as hedging contracts, then the corresponding external contracts should also be considered as hedging contracts. On the contrary, where the derivative contracts concluded by an NFC in the group that is not the trading entity do not qualify as hedging contracts, then the corresponding external contracts should not be considered as hedging contracts either.

In the simplest scenario, whereby an external transaction perfectly mirrors a derivative contract concluded by an NFC in the group that is not the trading entity, which does not qualify as hedging contract, the counter value to be considered for the sake of calculating the clearing threshold amounts to three times the notional value of the intragroup or external transaction.

For illustration purpose, let us suppose that:

- A is an NFC
- B is an NFC in the same group as A, and B is the entity specialised in dealing derivatives with entities outside the group
- A and B enter into an OTC derivative transaction, with a notional value of 100, e.g. A buys 100 and B sells 100
- B enters into an opposite transaction with an entity outside the group (C), i.e. B buys 100 from C.

Then the total notional amount to be counted towards the clearing thresholds is:

- Zero, if the transaction between A and B satisfies the hedging conditions with respect to A;

- 300, if the transaction between A and B does not satisfy the hedging conditions with respect to A, i.e. 100 for the buy transaction between A and B, 100 for the sell transaction between B and A, and 100 for the buy transaction between B and C.

(f) In order to determine whether it is above or below the clearing thresholds, the counterparty should first net their positions per counterparty, including where the counterparty is a CCP, and contracts and then add up the absolute notional value of all these net positions (calculated based on the notional amounts of the contracts). Netting per contracts and counterparty should be understood as fully or partially offsetting contracts having exactly the same characteristics (type, underlying, maturity, etc.) with the only exception being the direction of the trade and notional amount (in case of partial offset) concluded with the same counterparty.

(g) It could be challenging for a counterparty performing calculations a few days after the end of the previous month to calculate and use the month-end position of that month. For that reason, the counterparty could calculate with the 12-month period that started a month earlier and ended with the previous month- end. E.g. if a counterparty is performing calculations on 1 November 2019 and encounters difficulties with calculating its positions using the figures from 1 November 2018 to 31 October 2019, it can use a 12-month period ending on the previous month: from 1 October 2018 to 30 September 2019.

(h) ***Answer provided by the European Commission in accordance with article 16b(5) of the ESMA Regulation*[7]:**

Yes. Article 4a(3), unlike Article 10(3) EMIR, does not provide for a hedging exemption. The hedging exemption in Article 10(3) EMIR is meant to avoid impediments for non-financial counterparties to appropriately mitigate their commercial risks, but it is not meant to be applied when it comes to determining whether a financial counterparty should be subject to the obligation to clear centrally. Article 10(3) EMIR only refers to "non-financial counterparty or by other non-financial entities within the group to which the non-financial counterparty belongs," and not to financial entities within that group. Non-financial counterparties belonging to a group are not affected by the way the financial counterparties belonging to the same group calculate the threshold.

OTC Question 4 [last update 2 October 2019]

Article 11 of EMIR – Responsibility of the FC and NFC

Is a counterparty responsible for assessing whether its counterparty is above or below the clearing thresholds?

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[7] DISCLAIMER: The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

OTC Answer 4

Counterparties which trade OTC derivatives are obliged to determine their own status. A counterparty should obtain representations from its counterparties detailing their status. However, counterparties that are not subject to the clearing obligation an EMIR requirement for which they would need to know the status of their counterparties, do not need to obtain representations from their counterparties. For instance, an FC- or an NFC- would not need representations from its counterparties to know whether they need to clear the derivative trades they enter into with them because that FC- or NFC- is not subject to the clearing obligation regardless of the status of its counterparties.

A counterparty is not expected to conduct verifications of the representations received from its counterparties detailing their status and may rely on such representations unless they are in possession of information which clearly demonstrates that those representations are incorrect.

If a counterparty does not obtain representation from one of its counterparties detailing its status, it should assume that the counterparty is above the clearing thresholds and therefore subject to the relevant requirements applicable to FCs+ and NFCs+ respectively. The counterparty making this assumption will inform the other counterparty about the assumption that has been made.

OTC Question 5 [last update 5 August 2013]

Article 11 of EMIR – Timely confirmation

(a) *Does confirmation refer to (1) the sending part (i.e. each party must meet the deadline to send the confirmation to the other party) or (2) the signature or matching part (i.e. both parties must meet the deadline to sign or match the confirmation). Is negative affirmation allowed?*

(b) *What is the definition of "where available by electronic means?"*

(c) *Does the timely confirmation requirement apply only to the conclusion of the original contract or does it also apply to subsequent amendments to that contract (e.g. novation, result of portfolio compression)?*

(d) *Under what circumstances does the provision for later confirmation of transactions "with a counterparty located in a different time zone which does not allow confirmation by the set deadline" apply?*

(e) *For the purposes of the confirmation time limits, how should the term "business day" be interpreted for transactions between two different jurisdictions?*

(f) *What is the reference point in time from which the confirmation deadline applies?*

OTC Answer 5

(a) The term 'confirmation' is defined in Article 1(c) of the Commission Delegated Regulation (EU) No 149/2013 (RTS on OTC derivatives): it means the documentation of the agreement of the counterparties to all the terms of an OTC derivative contract.

Therefore, to comply with the confirmation requirements, the counterparties must reach a legally binding agreement to all the terms of an OTC derivative contract. The RTS implies that both parties must comply with it and agree in advance on a specific process to do so. Processes under which documentation is deemed to be finalised and accepted by both parties after a fixed deadline has expired would be compliant provided that both counterparties have agreed in advance to confirm by this process.

(b) Electronic confirmation may be available to the market (e.g. confirmation platforms) but not to a specific counterparty for a variety of legitimate reasons. If the counterparty is able to justify that electronic confirmation is not available to it, then confirmation may be performed by fax, paper, or manually processed emails.

(c) The timely confirmation of OTC derivative contracts applies wherever a new derivatives contract is concluded, including as a result of novation and portfolio compression of previously concluded contracts. The requirement does not apply to terminations provided that the termination removes all residual obligations in respect of that transaction.

(d) Article 12(3) of Regulation 149/2013 is intended to apply to transactions executed after 4 pm, local time of one or both counterparties. The article requires that the confirmation is done as soon as possible and, at the latest, one business day after the expiration of the confirmation time limit which would otherwise have applied.

(e) For these purposes, only days which are business days in the jurisdictions of both counterparties should be counted.

(f) The point in time which serves as a starting point to calculate the confirmation deadline is the date of execution of the transaction, irrespective of the execution process (e.g. voice, electronic). Therefore, if a transaction is executed over the phone on date T, the reference day to start calculating the confirmation deadline is T, as opposed to the date on which the counterparties start to exchange electronic information related to the confirmation of the transactions, before reaching a legally binding confirmation.

OTC Question 6 [last update 10 July 2017]

Article 3, 4(2) and 11(6) to 11(10) of EMIR – Intragroup transaction

(a) When can counterparties start applying for the intragroup exemption from the clearing obligation, and when can pension scheme arrangements start applying for the pension scheme transitional exemption from the clearing obligation?

(b) Is it necessary for the Commission to have adopted an implementing act (equivalence decision) under article 13(2) of EMIR in order for intragroup transactions between a counterparty established in the Union, and a counterparty established in a third country to qualify as an intragroup transaction under Article 3 of EMIR?

(c) What is the procedure to be observed by counterparties willing to benefit from the intragroup transactions exemption from the clearing obligation?

(d) *In accordance with Article 3 of EMIR, it is required that the counterparties to an intragroup transaction are "subject to an appropriate centralised risk evaluation, measurement and control procedures". When applying for the intragroup exemption from the clearing obligation in accordance with Article 4(2), what should the counterparties communicate to their competent authorities in this respect?*

(e) *May a contract between a Financial Counterparty (FC) and another counterparty be eligible for an intragroup exemption if:*

- *the FC belongs to both a group of undertakings referred to in Article 3(1) or Article 80(7) and (8) of Directive 2006/48/EC (CRD), and another group referred to in Articles 1 and 2 of Directive 83/349/EEC, and*
- *the other counterparty merely belongs to the group under Articles 1 and 2 of Directive 83/349/EEC?*

(f) *On which day does the 30 calendar day period referred to in EMIR Article 4(2) start?*

(g) *When counterparties established in two different EU member states apply for an intragroup transaction exemption from the clearing obligation to their national competent authorities (NCAs) under article 4(2)(a) of EMIR and the NCAs disagree on whether the conditions laid down in Article 3 are met, can the counterparties rely on the exemption?*

(h) *Where an AIF is subject to the clearing obligation of Article 4(1) of EMIR, can it make use of the exemption for intragroup transactions (Article 4(2) of EMIR)?*

OTC Answer 6

(a) Counterparties should apply for an exemption from the clearing obligation after the first Regulatory Technical Standard (RTS) on the clearing obligation enters into force. Counterparties may apply once for all their intragroup activity, irrespective of the fact that the classes of OTC derivative for which they apply are included or not in the RTS on the clearing obligation.

The same timing for counterparties to apply for the exemption from the clearing obligation should be observed by pension scheme arrangements and by counterparties applying for the intragroup transactions exemption (i.e. after the entry into force of the first RTS on the clearing obligation).

Following the entry into force of this RTS, the clearing obligation will only take effect after the phase-in to be specified therein, hence leaving sufficient time for the counterparties to apply for the exemption.

However, some competent authorities may facilitate the process of applications at an early stage where they consider it needed according to the nature and dimension of their markets.

Please also refer to Question II.8 of the European Commission's Q&A available at: http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/emir-faqs_en.pdf

(b) Yes, if a counterparty is established in a third country, the Commission must have adopted an implementing act under Article 13(2) in respect of the relevant third country in order for transactions between this counterparty and the counterparty established in the Union within the same group to qualify as intragroup transaction transactions under Article 3.

(c) There are two different processes for counterparties to benefit from the intragroup exemption from the clearing obligation, depending on whether the counterparty to the intragroup transactions is established in the Union (non-objection process described under Article 4(2)(a)) or in a third country in respect of which the European Commission has adopted an implementing act under Article 13(2) (authorisation process described under Article 4(2)(b)). ESMA is currently working with competent authorities to harmonise the process at European level to the extent possible. Counterparties will need to submit their applications/notifications related to intragroup transactions exemption to their respective competent authorities, and not to ESMA.

(d) When applying for the intragroup exemption from the clearing obligation in accordance with Article 4(2), the applicant counterparty should at least:

1. describe the risk management policies and controls and how they are centrally defined and applied;

2. demonstrate that senior management is responsible for risk management and that risk measurement is regularly reviewed;

3. demonstrate that regular and transparent communication mechanisms are established within the organisation, so that the management body, senior management, business lines, the risk management function and other control functions can all share information about risk measurement, analysis and monitoring;

4. demonstrate that internal procedures and information systems are consistent throughout the institution and reliable so that all sources of relevant risks can be identified, measured, and monitored on an aggregated basis and also, to the extent necessary, by entity, business line, and portfolio;

5. demonstrate that key risk information is regularly reported to the central risk management function to enable appropriate centralised evaluation, measurement and control risk across the relevant group entities.

When a notification under Article 4(2)(a) relates to intragroup transactions between counterparties established in different Member States, it is expected that similar information is sent to the respective competent authorities.

(e) Yes. In accordance with the definition of ‘group’ in Article 2(16), as well as Article 3(2)(d) of EMIR, such contract may be eligible for an intragroup exemption if the other counterparty, while not consolidated under the CRD, is part of the same consolidated non-financial group as the FC.

(f) The 30 calendar day period starts on the calendar day following receipt of the notification by the relevant NCA(s).

(g) No. Where either counterparty is notified during the 30 calendar day period following application that one NCA objects to the exemption, firms should not rely on the exemption, whether during or after the 30 calendar day period. For the avoidance of doubt, if counterparties apply to their respective NCAs on different dates, they should wait until the end of the later of the two 30 calendar day periods before relying on the exemption (provided neither NCA objected). Counterparties may reapply for the IGT exemption from the clearing obligation once they have addressed the objection(s) raised by the objecting NCA(s).

(h) ESMA is of the view that in the case of AIFs the exemption for intragroup transactions should be construed narrowly, and that in most cases it will not be possible for the exemption to be used. An AIF can only make use of the exemption for intragroup transactions if it has been established to form part of the same group (as defined in Article 2(16) of EMIR) as the counterparty to the OTC derivative contract and if it fulfils all the criteria for intragroup transactions set out in Article 3(2)(a)(i)(iv), (b), or (d) of EMIR.

Article 3(2)(a)(iii) of EMIR requires both counterparties to be included in the same consolidation on a full basis. In addition, they have to be subject to appropriate centralised risk evaluation, measurement and control procedures, as well as fulfil other specific requirements set out in Article 3(2) of EMIR.

An exemption to the clearing obligation based on Article 4(2) of EMIR can only be granted after a thorough case by case assessment, which will have to take into account whether the AIF has been established to form part of the same group as the counterparty to the OTC derivative contract and whether the AIF fulfils all the criteria set out in Article 3(2)(a), (b), or (d) of EMIR. Where an AIF is granted an intragroup exemption for the clearing obligation, it follows that the AIF will not be considered a distinct entity and will not be treated separately for other purposes under EMIR either, in particular for the purpose of the bilateral margining thresholds calculation. Therefore, the aggregate month end average notional amount referred in Article 28(1) of Commission Delegated Regulation (EU) 2016/2251 shall be calculated at the group level (including the relevant AIF).

OTC Question 7 [last update 21 May 2014]

Article 6 of EMIR: Public Register

When will the Public Register be available on ESMA's website and what type of information will be published in this register?

OTC Answer 7

The Public register contains two types of information:

1. The list of the classes of OTC derivatives notified to ESMA.

   This section of the register was published for the first time on 18 March 2014 after a notification was received by ESMA under the procedure described in Article 5(1) of EMIR, i.e. following the authorisation of the first CCP to clear certain classes of OTC derivatives. This part of the Public

Register is updated after each CCP authorisation and is available under the Post-Trading section of the following page:

http://www.esma.europa.eu/page/Registries-and-Databases

2. The list of classes subject to the clearing obligation.

   This section of the register will be published immediately after the entry into force of the RTS specifying the classes of OTC derivatives subject to the clearing obligation. These RTS will be adopted following the procedure described in Article 5(2) of EMIR.

OTC Question 8 [last update 4 June 2013]

Article 12(4) of Regulation (EU) 149/2013: Reporting of unconfirmed trades for more than 5 business days

According to Article 12(4) of Regulation (EU) 149/2013, financial counterparties shall have the necessary procedure to report on a monthly basis to the relevant NCA the number of unconfirmed OTC derivative transactions that have been outstanding for more than 5 business days:

(a) What is the starting point for the calculation of the 5 business days?

(b) At which frequency are FCs expected to report the number of transactions outstanding for more than 5 business days: at the end of each month, or by request from the national competent authority?

OTC Answer 8

(a) A trade is deemed outstanding for more than 5 business days if it is still unconfirmed 5 business days after the required confirmation date, which is set out on article 12(1) and 12(2).

(b) FCs need to ensure that the necessary procedures they have in place allow for: 1) the recording of all unconfirmed trades for more than 5 business days and 2) for the production of a monthly report of these unconfirmed trades that occurred the month before. The report does not need to be provided to the competent authorities that have not asked to receive it..

OTC Question 9 [Last update 1 November 2017]

Notional amounts

When calculating the positions in OTC derivatives to be compared to the clearing thresholds, NFCs shall use notional amounts, in line with OTC Q&A 3(e). How should the notional amounts be calculated?

OTC Answer 9

Notional amounts shall be calculated in accordance with art. 3(a) of Commission Delegated Regulation (EU) No 148/2013 (RTS on reporting to TR).

OTC Question 10 [last update 19 November 2021]

Article 10(3) of Regulation (EU) 648/2012: Hedging definition

In order to determine whether they exceed the clearing thresholds, non-financial shall include all OTC derivative contracts "which are not objectively measurable as reducing risks directly relating to that commercial activity or treasury financing activity" of itself or of its group.

(a) *Are policies adopted by non-financial counterparties or audited accounts sufficient to demonstrate compliance with the hedging definition?*

(b) *Should less frequent operations be captured in the scope of the definition of the "normal course of business"? Could OTC derivative contracts concluded rarely qualify for hedging?*

(c) *When NFCs use portfolio or macro hedging, how should they demonstrate compliance with the hedging definition?*

(d) *Can non-financial counterparties (NFCs) whose core activity is to buy, sell or own financial instruments, benefit from the hedging exemption when using OTC derivative contracts to hedge certain risks, for example risks arising from the potential indirect impact on the value of assets the NFC buys, sells or owns resulting from the fluctuations of interest rates, inflation rates, foreign exchange rates or credit risk?*

OTC Answer 10

(a) The definition of hedging for EMIR purposes includes and is broader that the definition used in the IFRS accounting rules. Therefore OTC derivative contracts that qualify as hedging under the definition of the IFRS rules also qualify as hedging for EMIR purposes. Moreover, some OTC derivative contracts may qualify as hedging for EMIR purposes (which includes also proxy hedging and macro or portfolio hedging) although they do not qualify as hedging under the definition of the IFRS rules.

The policies adopted by a counterparty, in particular when they are audited, provide an indication of the nature of the OTC derivative contracts this counterparty can conclude. This indication should be comforted by the analysis of the OTC derivative contracts actually concluded and the effective hedging that need to take place when the contract is concluded and during the life time of the contract.

Therefore, except where the OTC derivative contracts concluded by a counterparty qualify as hedging contracts under the IFRS rules, neither audited accounts nor internal policies *per se* are sufficient to demonstrate that the relevant contracts are for hedging purposes, but need to be supplemented by evidences of the actual risk directly related to the commercial or treasury financing activity that the contract is covering.

(b) The frequency of the OTC derivative contract is not a criterion to determine whether it is considered in the scope of the commercial activity or treasury financing activity of non-financial counterparties.

(c) When a NFC uses portfolio or macro hedging it may not be able to establish a one-to-one link between a specific transaction in OTC derivative and a specific risk directly related to the commercial activity of treasury financing activities entered into to hedge it. The risks directly related to the commercial or treasury financing activities may be of a complex nature e.g. several geographic markets, several products, time horizons and entities. The portfolio of OTC derivative contracts entered into to mitigate those risks (hedging portfolio) may derive from complex risk management systems.

While the implementation of risk management systems would be assessed by the relevant NCA on a case by case basis, they should fulfil the following criteria:

1. The risk management systems should prevent non-hedging transactions to be qualified as hedging solely on the grounds that they form part of a risk-reducing portfolio on an overall basis.
2. Quantitative risk management systems should be complemented by qualitative statements as part of internal policies, defining a priori the types of OTC derivative contracts included in the hedging portfolios and the eligibility criteria, and stating that the transactions in contracts included in the hedging portfolios are limited to covering risks directly related to commercial or treasury financing activities.
3. The risk management systems should provide for a sufficiently disaggregate view of the hedging portfolios in terms of e.g. asset class, product, time horizon, in order to establish the direct link between the portfolio of hedging transactions and the risks that this portfolio is hedging. NFCs should establish a sufficiently clear link between the type of contracts entered into and the commercial or treasury financing activity of the group. Where some components of a derivatives portfolio can be shown to be hedging but others are speculative, the speculative components must be counted towards the clearing threshold. In such a case, it is not acceptable to class the whole portfolio, including the speculative components, as hedging even if it can be shown that the aggregate effect of the whole portfolio is risk reducing.
4. When a group has NFCs established in different countries of the Union, and that group has a central unit responsible for the risk management systems of several entities of the group, the systems should be used consistently in all the entities of the group
5. The risk management system should not be limited to a binary mechanism whereby, up to a certain limit (e.g. a predefined risk metric reaches a predefined value in absolute or relative terms), all OTC derivative transactions are classified as hedging, and once this limit is exceeded, all OTC derivative transactions are classified as non-hedging.

(d) ***Answer provided by the European Commission in accordance with article 16b(5) of the ESMA Regulation***[8]

[8] DISCLAIMER: The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

Yes. The hedging exemption set out in Article 10(3) EMIR applies to all non-financial counterparties, irrespective of what their core activity is. The list of financial counterparties in Article 2(8) EMIR is a closed list. It does not allow for the treatment of non-financial counterparties as financial counterparties for certain EMIR provisions, such as Article 10(3). That provision itself does not distinguish which non-financial counterparty is allowed to use the hedging exemption depending on that counterparty's specific activity

OTC Question 11 [last update 4 June 2013]

Article 14 of Regulation (EU) 149/2013: Portfolio Compression

(a) *When financial and non-financial counterparties conclude that a portfolio compression exercise is not appropriate, they need to be able to provide a "reasonable and valid explanation". What is considered as a "reasonable and valid explanation"?*
(b) *Does the requirement on portfolio compression prevent an offsetting transaction to be concluded with a counterparty different from the counterparty to the initial transaction?*

OTC Answer 11

(a) The explanation the counterparty needs to be able to provide to the competent authority when they are requested to do so should adequately demonstrate that portfolio compression was not appropriate under the prevailing circumstances. Depending on the circumstances, the justification could include that:

1. the portfolio is purely directional and does not allow any offsetting transactions;
2. multilateral compression services are not available in the relevant markets, for the relevant products, or to the relevant participants and that compression on a bilateral basis would not be feasible;
3. compression would materially compromise effectiveness of the firm's internal risk management or accounting processes.

(b) No. The requirement on portfolio compression does not prevent an offsetting transaction to be concluded with a counterparty different from the counterparty to the initial transaction.

OTC Question 12 [last update 20 March 2014]

Article 11 of Regulation (EU) 648/2012: Risk Mitigation techniques for OTC derivative contracts not cleared by a CCP

(a) *To which OTC derivative contracts not cleared by a CCP do*

1. *Daily mark-to-market (EMIR Article 11(2)),*
2. *Portfolio Reconciliation and Dispute Resolution (EMIR Article 11(1) and Regulation (EU) 149/2013 Articles 13 and 15), and*
3. *Portfolio Compression (Regulation (EU) 149/2013 Article 14) apply?*

(b) *What is the definition of "Counterparties" used in Regulation (EU) 149/2013 Article 13 (Portfolio reconciliation) and Article 14 (Portfolio compression)? Does it include third country entities?*

(c) Which risk-mitigation techniques mentioned in Article 11(1) of EMIR apply to NFC below the clearing threshold (NFC-)?

(d) Should all financial counterparties comply with the obligations to report to the competent authority designated under MiFID, as provided in Articles 12 and 15 of the RTS on OTC derivatives, even if they are not subject to MiFID. In particular:

1. The duty to have the necessary procedure to report on a monthly basis to the competent authority designated under MiFID the number of unconfirmed OTC derivative transactions that have been outstanding for more than five business days; and

2. The duty to report to the same authority any disputes between counterparties relating to an OTC derivative contract, its valuation or the exchange of collateral for an amount or a value higher than EUR 15 million and outstanding for at least 15 business days ?

(e) In case of fund (UCITS, AIF), should the report be sent to the competent authority designated to supervise the fund or the one designated to supervise the fund manager?

(f) In case of branches, should the report be sent to the competent authority of the EU Member State where the branch operates?

(g) *Do the requirements on Timely Confirmation, Portfolio Reconciliation, Dispute Resolution and Portfolio Compressions apply where a contract is entered into between a counterparty covered by EMIR requirements and an entity established in the EU and exempted in accordance with Article 1 of EMIR?*

(h) Are FCs and NFCs allowed to delegate the risk-management procedures and arrangements referred to in EMIR Article 11(1) to an asset manager, who is providing portfolio management service to the counterparty on an agency basis?

(i) Do the procedures prescribed in Article 11 of EMIR have to be implemented between a financial or non-financial counterparty subject to EMIR, and a counterparty that is exempted as defined in Article 1 of EMIR?

(j) An EU-based counterparty executes OTC-derivative contracts cleared by a third-country CCP not recognized under Art. 25 EMIR. Is the EU-based counterparty still required to apply risk mitigation techniques under Art. 11 EMIR?

OTC Answer 12

(a) The requirement for FC and NFC+ to mark-to-market on a daily basis the value of non-cleared OTC derivative contracts applies to contracts outstanding on or after 15 March 2013, date of entry into force of the relevant technical standard, irrespective of the date when they were entered into.

The portfolio reconciliation, dispute resolution and portfolio compression requirements also apply to the portfolio of outstanding OTC derivative contracts. As the relevant technical standards enter into force on 15 September 2013, the requirements apply to the portfolio of outstanding contracts as of such date, irrespective of the date when they were entered into, and to any contract concluded thereafter.

(b) Article 11 of EMIR, which provides the basis of these requirements, applies wherever at least one counterparty is established within the EU. Therefore, where an EU counterparty is transacting with a third country entity, the EU counterparty would be required to ensure that the requirements for portfolio reconciliation, dispute resolution, timely confirmation and portfolio compression are met for the relevant portfolio and/or transactions even though the third country entity would not itself be subject to EMIR. However, if the third country entity is established in a jurisdiction for which the Commission has adopted an implementing act under Article 13 of EMIR, the counterparties could comply with equivalent rules in the third country.

(c) Non-financial counterparties below the clearing threshold are subject to the following risk-mitigation techniques:
   1. Timely confirmation: the confirmation timeframes applicable to NFC- are specified in Article 12(2) of the RTS on OTC derivatives;
   2. Portfolio reconciliation: the reconciliation frequency applicable to NFC- is specified in Article 13(3)(b) of the RTS on OTC derivatives;
   3. Portfolio compression, under the conditions defined in Article 14 of the RTS on OTC derivatives;
   4. Dispute resolution, as further specified in Article 15(1) of the RTS on OTC derivatives.

(d) Yes. All financial counterparties (including non-MiFID firms) must comply with the obligations provided in Articles 12 and 15 of the RTS on OTC derivatives, along with the other EMIR requirements, where applicable.

(e) The national competent authority towards which these obligations shall be fulfilled is the one having jurisdiction over the financial counterparty for which the OTC derivative contract involved has been entered into. For funds (AIF or UCITS), and except where the fund manager executes trades on its own account and not on behalf of the funds it manages, it means that the report mentioned in Articles 12 and 15 should be sent to the competent authorities designated under MiFID in the jurisdiction of the fund (not of the asset manager).

(f) No. A branch should be treated as part of the same legal entity as the headquarter, thus subject to the same jurisdiction as the one where the headquarter is established. Therefore the report mentioned in Articles 12 and 15 should be sent to the competent authority designated under MiFID in the jurisdiction of the headquarters.

(g) No. The requirements on Timely Confirmation, Portfolio Reconciliation, Dispute Resolution and Portfolio Compressions do not apply when one counterparty to the transactions is an entity established in the EU and exempted in accordance with Article 1 of EMIR.

(h) Yes to the extent that delegation is permitted under the relevant applicable national or EU legislation regulating the activities of asset managers or of investment funds.

(i) No. However, both the exempted and the non-exempted counterparties may on a voluntary basis choose to establish any contractual arrangements with the objective of replicating the obligations of Article 11 of EMIR.

(j) No, Article 11 of EMIR only applies to OTC derivative contracts not cleared by a CCP, irrespective of its status under EMIR. The conditions under which financial and non-financial counterparties can be serviced by third-country CCPs are generally addressed in Articles 25 and 89 of EMIR. This covers the transitional period during which financial and non-financial counterparties can be serviced by third-country CCPs that have applied for recognition before 15 September 2013, as well as after the transitional period when financial and non-financial counterparties can still access non recognised third-country CCPs as clients (via a third-country clearing member only) if they wish to clear products other than derivatives subject to a clearing obligation under EMIR. With regards to the clearing obligation, Article 4(3) clarifies that clearing with a third country CCP is only allowed when that CCP is recognised under Article 25, irrespective of the capacity in which EU-based counterparties access the CCP (as clearing members, clients or through indirect clearing arrangements).

OTC Question 13 [last update 2 October 2019]

Status of Entities not established in the Union

(a) How should a counterparty determine whether an entity established in a third country would be a financial counterparty above the clearing thresholds (FC+) or below the clearing thresholds (FC-) if it was established in the Union?

(b) How should a counterparty determine whether an entity established in a third country which they believe would be an NFC is an NFC+ or NFC-?

(c) Does a pension scheme established in a third country benefit from the exemption from the clearing obligation provided under EMIR?

(d) Do sovereign wealth funds established in third countries fall within the scope of application of EMIR? If so, do they qualify as financial counterparty or non-financial counterparty?

OTC Answer 13

(a) This needs to be assessed by individual counterparties in cooperation with their third-country counterparties, taking into account the nature of the activities undertaken by the counterparty in question and its positions calculated at the group level. If a third country entity would be a financial counterparty if it were established in the Union and is part of a group which also includes financial counterparties established in the Union, its FC+ or FC- status should be assumed to be the same as that of the EU FCs. Where there is no EU FC or EU NFC as part of the group, the only way to determine the status of such a third country entity is to calculate its group-level position against the EMIR clearing thresholds.

The process and any assumptions made in order to arrive at such a determination should be documented.

(b) If the third country entity is part of a group which also includes NFCs established in the Union, its NFC+ or NFC- status should be assumed to be the same as that of the EU NFCs and this information should be requested from the counterparty. If the third country entity is not part of such a group, but benefits from a similar, limited exemption in its own jurisdiction, it may be assumed that the entity would be NFC- if it were established in the Union.

If neither of the above holds, the only way to determine the status of such a third country entity would be for it to calculate its group-level position against the EMIR clearing thresholds.

In line with OTC Q&A no. 4, EU counterparties should obtain representations from their third country counterparties detailing their status. The EU counterparty is not expected to conduct verifications of the representations received from the third country entity detailing their status and may rely on such representations unless they are in possession of information which clearly demonstrates that those representations are incorrect. If it is not possible to assess what would be the counterparty's status under EMIR, firms should assume that their counterparty status is FC+ or NFC+ and apply EMIR requirements accordingly.

(c) EMIR provides for the conditions that European pension schemes shall meet in order to benefit from the exemption. These conditions are specific for defined categories of pension schemes established in the EU. Therefore, the exemption from the clearing obligation does not apply to a pension scheme established in a third country.

(d) Sovereign wealth funds established in third countries are not exempted from the scope of EMIR. As clarified in OTC Q13(c), an exemption which is designed for entities established in the Union cannot be extended to equivalent entities established in third countries.

A sovereign wealth fund will qualify as financial counterparty under EMIR where it meets the definition of an AIF and it would be subject to Directive 2011/61/EU (AIFMD) if it was established in the Union.

However, where a sovereign wealth fund does not meet the definition of an AIF and is out of scope of the AIFMD, such a sovereign wealth fund shall be treated as non-financial counterparty in accordance with Article 10 of EMIR.

This would typically be the case e.g. where a sovereign wealth fund has a single investor or supports the social security and pension systems of a third country. To determine whether such a third country sovereign wealth fund is a NCF+ or NCF-, a counterparty shall follow the process described in OTC Answer 13(b).

OTC Question 14 [last update 20 December 2013]

Portfolio Reconciliation – Article 13 of the RTS on OTC Derivatives

(a) The portfolio reconciliation obligation enters into force on 15 September 2013. For counterparties having to perform their portfolio reconciliation annually, should a reconciliation be made before 31 December 2013? For counterparties having to perform their portfolio reconciliation quarterly, by which date does the first portfolio reconciliation need to be made?

(b) What are the "key trade terms that identify each particular OTC derivative contract" for the purpose of the portfolio reconciliation requirements?

(c) *Who is legally responsible for the portfolio reconciliation obligation where the trade take place with a calculation agent?*

(d) *The frequency of portfolio reconciliation depends on the status of the counterparty (FC, NFC+ or NFC-) and on the number of outstanding contracts the counterparties have with each other. Those two elements may change in time and therefore modify the frequency of the portfolio reconciliation requirement. At which frequency should the status of the counterparty and the number of outstanding contracts be reassessed to ensure that the appropriate frequency of portfolio reconciliation is adopted?*

(e) *Non-Financial counterparties below the clearing threshold are not required to mark-to-market or mark-to-model their portfolios on a daily basis, but are subject to portfolio reconciliation on a quarterly/annually basis. How are they expected to reconcile the valuation of their contracts?*

OTC Answer 14

(a) For counterparties having to perform their portfolio reconciliation annually the first one shall be made within one year from the entry into force of the RTS on OTC derivatives (15 March 2013), i.e. before 15 March 2014.

For counterparties having to perform their portfolio reconciliation quarterly, the first one shall be made within one quarter from the date of application of Article 13 of the RTS on OTC derivatives (15 September 2013), i.e. before 15 December 2013.

(b) As provided for in Article 13 of RTS on OTC derivatives, such terms shall include the valuation attributed to each contract in accordance with Article 11(2) of EMIR. They should also include other relevant details to identify each particular OTC derivative contract, such as the effective date, the scheduled maturity date, any payment or settlement dates, the notional value of the contract and currency of the transaction, the underlying instrument, the position of the counterparties, the business day convention and any relevant fixed or floating rates of the OTC derivative contract.

(c) Counterparties can agree that the calculation agent will be in charge of performing the portfolio reconciliation. In any case, each counterparty remains legally responsible for the portfolio reconciliation obligation. The processes under which a counterparty is deemed to have perform portfolio reconciliation after a fixed deadline has expired would be compliant provided that both counterparties have agreed in advance to perform portfolio reconciliation by this process.

(d) The frequency of the portfolio reconciliation requirements should be reassessed at each portfolio reconciliation date. If for example a NFC- is subject to a quarterly reconciliation with Counterparty X and performs the first portfolio reconciliation on 15 December 2013, the date of the next portfolio reconciliation should be:

1. 15 March 2014 (quarterly requirement) if the NFC- is still a NFC- on 15 December 2013, and if the number of its outstanding contracts with Counterparty X was above 100 at any

time in the previous reconciliation period, i.e. from 15 September 2013 to 15 December 2013. This should be assessed on the reconciliation date, i.e. on 15 December 2013.

2. 15 December 2014 (yearly requirement) if the NFC- is still a NFC- on 15 December 2013, and if the number of its outstanding contracts with Counterparty X was below 100 at all time during the previous reconciliation period, i.e. from 15 September 2013 to 15 December 2013. This should be assessed on the reconciliation date, i.e. on 15 December 2013.

(e) The Portfolio Reconciliation requirements must cover the key trade terms and include at least the valuation attributed to each contract in accordance with EMIR Article 11(2). Since NFC- are not required to perform mark-to-market or mark-to-model valuation on a daily basis (as Article 11(2) of EMIR only applies to FC and NFC+), they can rely on the valuation of their counterparties or on other means, in line with Article 13(2) of the RTS on OTC derivatives, to the extent that the valuation as well as the other key terms of the contract are reconciled in accordance with the timelines established in Article 13(3)(b) of the RTS on OTC derivatives.

OTC Question 15 [last update 5 August 2013]

Dispute Resolution – Article 15 of the RTS on OTC Derivatives

(a) Should counterparties identify and record each disputes relating to the recognition or valuation of the contract and to the exchange of collateral, even the minor one?

(b) Does dispute resolution include the disputes related to cashflows settlement?

(c) When reporting outstanding disputes in accordance with Article 15(2) of Regulation 149/2013 should the amount or value of outstanding disputes be calculated and reported on a trade by trade or portfolio basis?

(d) *How frequently are financial counterparties required to notify their relevant national authority of outstanding disputes in accordance with article 15(2) of Regulation 149/2013?*

(e) *What is the 'valuation' referred to in Article 15 of the RTS on OTC derivatives?*

OTC Answer 15

(a) Counterparties may agree upfront that discrepancies that amount to a value below a pre-defined threshold do not count as disputes. If that is the case, these minor discrepancies would not count as disputes. All the other discrepancies would give rise to disputes and be treated according to Article 15 of the RTS on OTC derivatives.

(b) Yes. A dispute may be caused by cashflows settlement breaks.

(c) The amount or value of outstanding disputes should be calculated and reported on a trade by trade basis whenever possible. However, a portfolio basis may be used if the disputed valuation or collateral, for example initial margin, is calculated at the portfolio level.

(d) As a minimum, financial counterparties are expected to make a monthly notification of any disputes outstanding in the preceding month. National competent authorities may require more frequent reporting of outstanding disputes.

(e) The valuation is the one attributed to each contract in accordance with Article 11(2) of EMIR.

OTC Question 16 [last update 31 March 2015]

Pension Scheme exemption from the clearing obligation – Article 2(10) and 89 of EMIR

(a) If a pension scheme relies on the temporary 3 year exemption from the Clearing Obligation stated in Article 89(1) of EMIR, and that the exemption is not extended after 3 years, which OTC derivative contracts will such pension scheme have to clear after expiry of the exemption?

(b) What is the timing and application of the "primary purpose" of providing retirement benefits test in Art. 2(10)(d) of EMIR for pension schemes eligible and benefiting from a clearing exemption? Should it be considered only at the time the transaction is entered into or on an ongoing basis?

(c) If pension scheme arrangements, as defined in Article 2 (10) EMIR are granted an exemption under Article 89 and outsources management of its assets to a third party, either by way of delegation or through the purchase of a third party managed vehicle, will the assets still benefit from that exemption?

OTC Answer 16

(a) In accordance with the second paragraph of Article 89(1), the OTC derivative contracts entered into during the temporary exemption are not subject to the clearing obligation. Therefore only new contracts entered into after expiry of the exemption would have to be cleared.

(b) The "primary purpose" test would need to be considered only at the time the transaction is entered into. Therefore if a transaction were eligible for a clearing exemption it would remain exempt until its maturity or termination, whichever the earliest.

(c) The exemption is granted to the pension scheme arrangements, in consideration of the nature of the activity, therefore the fact that the assets are not managed wholly and directly by the pension scheme arrangement does not prejudice the status of that exemption. However, when a third party asset manager, manages assets from an exempted pension scheme arrangement, it should do so in a way that:

a. does not comingle exempt and non-exempt assets;

b. the derivative contract clearly identifies that it is concluded for an exempt pension scheme under Article 2 (10) and Article 89(1) & (2) (as appropriate);

c. keep the assets and records in a way to allow regulators to check that the derivative contract reduces investment risks directly related to the financial solvency of the pension scheme.

OTC Question 17 [last update 15 July 2019]

Frontloading requirement for the clearing obligation – Article 4(1)(b)(ii) of EMIR

EMIR, as amended by the EMIR Refit text, no longer contains a frontloading requirement. As a result, the previous Q&A on frontloading is no longer relevant and has been deleted.

OTC Question 18a [last update 11 February 2014]

Article 4(4) of EMIR and RTS 149/2013 Article 2 – Indirect clearing

Do the provisions of Article 4 of EMIR and Article 2 of Commission Delegated Regulation (EU) No 149/2013 *on indirect clearing apply only to products which are subject to the clearing obligation or to all products?*

OTC Answer 18a

The fact that the provisions are lodged within Article 4 of EMIR and are said to be for the purpose of meeting the clearing obligation means that that they only apply to OTC derivatives.

OTC Question 18b. [Last update 14 December 2017, applicable from 3 January 2018]

Article 4(2)(b) of RTS 2017/2155 – Segregation level for indirect clearing accounts

In the event of a clearing member default, is it permissible for a CCP to liquidate all of the collateral recorded in all the gross omnibus indirect client accounts (referred to in paragraph 2(b)) together and apply the resulting sum collectively in order to cover losses or to enable the netting of positions across different accounts?

OTC Answer 18b

No, Article 4(4)(b) of the Indirect Clearing RTS requires that a clearing member shall open and maintain in the CCP a segregated account for the exclusive purpose of holding the assets and positions of indirect clients of each client held by the clearing member in an account as referred to in paragraph 2(b). Therefore, a clearing member would have to open a separate account at the CCP for each client's pool of Indirect Clients who have elected the account referred to in paragraph (2)(b).

In the event of a clearing member default, Recital 6 of the Indirect Clearing RTS provides that indirect clients' assets and positions which are held in an indirect clearing account, including gross omnibus accounts referred to in Article 4(2)(b), may still be exposed to the losses of another indirect client within the same account. However, to the extent a clearing member has opened at the CCP several gross omnibus indirect client accounts referred to in Article 4(2)(b) for each of its clients, positions recorded in those different gross omnibus indirect client accounts at the CCP may not be netted against each other and assets covering the positions in one of these gross omnibus indirect client accounts may not be exposed to losses connected to positions held in a different account.

OTC Question 19 [last update 21 May 2014]

Article 1 of EMIR – Classification of non-EU Central Banks

In which EMIR counterparty category does a non-EU central bank fall?

OTC Answer 19

If a non-EU central bank is listed in Article 1(4) of EMIR (as amended by the European Commission from time to time pursuant to Article 1(6) of EMIR), it is exempt from EMIR. For the purpose of the clearing obligation and risk mitigation techniques other than exchange of collateral, if a non-EU central bank is not listed in Article 1(4) of EMIR (as amended by the European Commission from time to time pursuant to Article 1(6) of EMIR), it is to be treated under EMIR as a third country entity that would be an NFC if it were established in the EU.

OTC Question 20 [last update 15 July 2019]

Article 4 of EMIR – Clearing obligation

(a) Article 4(1)(b) of EMIR requires to clear the OTC derivative contracts (pertaining to a class of OTC derivatives that has been declared subject to the clearing obligation) that are entered into or novated either on or after the date from which the clearing obligation takes effect. What types of novations are covered in this article?

(b) Does the clearing obligation apply to a swap which results from the exercise of a swaption?

OTC Answer 20 [last update 15 July 2019]

(a) All types of novations are covered (e.g. the replacement of a party to a derivative contract with another party giving rise to a new derivative contract).

(b) A swap which results from the exercise of a swaption is subject to the clearing obligation when the swap and the corresponding swaption are entered into on or after the date on which the clearing obligation takes effect.

OTC Question 21 [last update 31 March 2015]

Art 2.1 of RTS on Third Country contracts – Responsibility

Which entity is responsible for assessing whether an OTC derivative contract would be covered by the "guarantee limb" of the RTS on Third Country contracts (i.e. Article 2(1) of Commission Delegated Regulation (EU) No 285/2014 of 13 February 2014) and for compliance with any obligations under EMIR arising as a result of the application of the RTS on Third Country contracts?
– the guarantor, the third country entity whose liabilities are covered (the "guaranteed entity") or the third country beneficiary of the guarantee?

OTC Answer 21

The regulation applies within the Union and the EU financial entity granting the guarantee is responsible for assessing whether the conditions are met for the regulation to apply and for ensuring that the relevant EMIR requirements are met. For this purpose, it can arrange the relevant procedure (e.g. a notification) with the guaranteed third country entity in order to get the information and data it needs to perform the assessment and ensure compliance.

OTC Question 22 [last update 31 March 2015]

Article 2.1 of RTS on Third Country contracts - Conditions – cumulatively or singly?

In the following three cases in which a single guarantor gives several guarantees, should these guarantees be considered cumulatively or singly for the purpose of assessing whether the conditions in Article 2(1) of the RTS on Third Country contracts are met?

> *(case a) Guarantee A over Guaranteed Entity A's liabilities to Beneficiary A and Guarantee B over Guaranteed Entity B's liabilities to Beneficiary B, where the two guarantees are unrelated, except that they have the same guarantor.*
>
> *(case b) Guarantee A over Guaranteed Entity A's liabilities to Beneficiary A and Guarantee B over Guaranteed Entity A's liabilities to Beneficiary B.*
>
> *(case c) Guarantee A over Guaranteed Entity A's liabilities to Beneficiary A and Guarantee B over Guaranteed Entity A's liabilities to Beneficiary A.*

OTC Answer 22

> (case a) Without prejudice to Article 3 of the RTS on Third Country contracts, the conditions should be read separately for each guarantee. The two third country entities are different for each of the guarantees described.
>
> (case b) Both guarantees should be looked at in conjunction because they both could involve exposure on the EU guarantor in relation to a single guaranteed entity as otherwise the multiplication of guarantees could allow circumvention of the provision.
>
> (case c) The conditions should be read by taking the two guarantees together.

OTC Question 23 [last update 31 March 2015]

Article 2 RTS on Third Country contracts - Effect on existing trades

(a) Does the RTS on Third Country contracts apply to OTC derivative contracts concluded before the date of entry into force of the RTS?

(b) Does the RTS on Third Country contracts apply to OTC derivative contracts made after the entry into force of the RTS, but covered by a guarantee which meets the conditions set out in the RTS which was provided before the entry into force of the RTS?

OTC Answer 23

(a) No and this answer is also set out in paragraphs 44 and 45 of ESMA's Final Report dated 15 November 2013 on the RTS.

(b) Yes and the last paragraph of Article 2(1) expressly contemplates that application. If there is a change in some of the inputs to the calculation against the threshold, i.e. the inclusion in a guarantee of an additional existing trade or an increase in the amount of the guarantee, then relevant contracts entered into after the effective date of the RTS would be brought within scope of Article 2. The parties to the relevant arrangements for the OTC derivatives then falling within the scope of the RTS would be required promptly to meet the relevant requirements.

OTC Question 24 [last update 2 June 2016]

Article 2 of Regulation (EU) 2015/2205 on the clearing obligation: Categories of counterparties

The clearing obligation (in relation to the first Regulation on the clearing obligation[9]) takes effect on different dates depending on the classification of the counterparties to the OTC derivative transactions. When should counterparties have completed the process of (1) determining the category of counterparty to which they belong and (2) communicating this information to their OTC derivatives counterparties? What happens if a counterparty does not undergo the above process by that time?

OTC Answer 24

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[9] Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015, *OJ L 314, 1.12.2015, p. 13.*

The first Delegated Regulation on the clearing obligation entered into force on 21 December 2015, therefore the obligations detailed in it apply to all concerned entities, in accordance with Article 4 of EMIR. The phase-in and the different frontloading start dates of this Regulation were introduced to provide sufficient time for counterparties to know to which category they and their own counterparties belong, and to prepare for the clearing of their relevant OTC derivative contracts.

Categories 1 and 4

CCPs have published the list of counterparties classified in Category 1 (see Section 1.3 of the Public Register on the Clearing Obligation). It is therefore assumed that counterparties in Category 1 have completed their self-classification and made this information available to their counterparties. In addition, for Category 1 counterparties, frontloading started to apply on 21 February 2016.

Category 4 is composed of some non-financial counterparties only. The counterparty classification between financial and non-financial counterparties should have been already completed as it is relevant for the compliance with other applicable requirements under EMIR (e.g. Article 11).

Categories 2 and 3

For counterparties which are neither in Category 1 nor in Category 4, the determination of the category of counterparty depends on the aggregate month-end average of outstanding gross notional amount of non-centrally cleared derivatives for January, February and March 2016 (at group level).

In addition, the frontloading start date for counterparties in Category 2 is set at 21 May 2016.

Categorisation

Therefore, between March 2016 and 21 May 2016, counterparties should have completed the two following steps:

(1) determine whether they belong to Category 2 (in which case frontloading would be applicable to them as of 21 May 2016) or to Category 3 (in which case frontloading would not apply to them), and

(2) obtain from their counterparties in Categories 2 and 3 the outcome of their counterparty classification, and inform them that in the case this information is not provided by 21 May 2016, and where it is not possible for the counterparty to establish the category of the other counterparty, it will assume it is classified in category 2 for the purpose of compliance with the clearing obligation. In this situation, counterparties should immediately inform their counterparty of the assumption that has been made about them.

OTC Question 25 – Clearing start date for Category 3 and 4 [Last update 28 May 2019, applicable from 17 June 2019]

(a) By when does an FC+ in Category 3 need to start clearing?

(b) By when and for which asset classes does an NFC+ in Category 4 need to start clearing?

OTC Answer 25

(a) Counterparties in Category 3[10] that are above the clearing thresholds on the day Refit enters into force or that choose not to conduct the calculation will become subject to the clearing obligation. They will have to start clearing OTC derivative contracts (pertaining to a class of OTC derivatives which is subject to the clearing obligation) entered into or novated more than 4 months following their notification to ESMA and the relevant NCAs (notification that should be submitted on the day Refit enters into force), rather than on 21 June 2019, the date when the clearing obligation is being phased-in for Category 3 according to the relevant Commission Delegated Regulations on the clearing obligation.

(b) Until the day Refit enters into force, NFCs+ in Category 4 that were above the clearing thresholds were subject to the clearing obligation for all the asset classes of derivatives, independently from the asset class(es) in which they exceeded the clearing thresholds. Following the entry into force of Refit, they are subject to the clearing obligation only for the specific asset class(es) of derivatives for which they exceed the clearing thresholds (when they choose to calculate, otherwise they continue to be subject to the clearing obligation in all asset classes). Therefore, for the asset class(es) in which they exceed the clearing thresholds they will need to continue to clear the OTC derivative contracts belonging to classes of derivatives in scope of the clearing obligation as of the entry into force of Refit.

For example, when NFCs+ in Category 4 exceed the clearing thresholds in the interest rate asset class on the day of entry into force of Refit or choose not to calculate, they will need to continue clearing their interest rate derivative contracts in scope of the clearing obligation and denominated in EUR, GBP, JPY and USD. Similarly, when NFCs+ in Category 4 exceed the clearing thresholds in the credit asset class on the day of entry into force of Refit or choose not to calculate, they will need to continue clearing their credit derivative contracts in scope of the clearing obligation.

However, NFCs+ in Category 4 that are above the clearing thresholds in the interest rate asset class on the day Refit enters into force or that choose not to calculate, will become subject to the clearing obligation and will have to start clearing their interest rate derivative contracts in scope of the clearing obligation and denominated in NOK, PLN and SEK entered into or novated more than 4 months following their notification to ESMA and the relevant NCAs, rather than on 9 August 2019, the date when the clearing obligation is being phased-in for Category 4 for these classes, according to the relevant Commission Delegated Regulations on the clearing obligation.

Where an NFC that was not yet subject to the clearing obligation before Refit enters into force calculates its positions and exceeds the clearing thresholds on the day Refit enters into force, it becomes subject to the clearing obligation only for the OTC derivative contracts belonging to the classes of derivatives in scope of the clearing obligation in the asset class(es) for which it exceeds the clearing thresholds, and entered into or novated more than four months following its notification to ESMA and the relevant NCA. When the NFC chooses not to calculate, in this case the clearing obligation then applies to all its derivative contracts belonging to classes of derivatives in scope of the clearing obligation (i.e. interest rate derivative and credit derivative classes) entered into or novated more than four months following its notification to ESMA and the relevant NCAs.

[10] As per Article 2 in Commission Delegated Regulation (EU) 2015/2205; Commission Delegated Regulation (EU) 2016/592 and Commission Delegated Regulation (EU) 2016/1178.

Part II: CCPs

Last update: 7 January 2020

CCP Question 1 [last update 20 March 2013]

Article 18 of EMIR – Most relevant currencies for the determination of participation in a college:

Which are the criteria to be used by a new entity that applies for authorisation as a CCP, if the respective entity has not performed any clearing activities before?

CCP Answer 1

In the case of a new entity which has not performed any clearing activities before, the determination of the most relevant currencies for the purpose of membership of the CCP college would be performed on the basis of the relative share of each currency in the estimated volumes across all financial products proposed to be cleared by the CCP.

A similar determination would also be made for CCPs which have performed clearing activities for less than one year.

CCP Question 2 [last update 20 March 2013]

Article 46 of EMIR – collateral requirements and recording of client assets:

What is the requirement on a CCP for the recording of financial instruments posted to it as margins, default fund contributions or contributions to other financial resources? Is it possible for a CCP to record the value assigned to financial instruments post-haircut?

CCP Answer 2

Article 46(1) of EMIR sets out the purpose of haircuts by making reference to the 'potential' for the value of the assets posted as collateral to decline. In order to adequately apply haircut requirements set-out in Article 46(1), a CCP needs to have procedures enabling the record of the pre-haircut value of financial instruments actually posted to the CCP by clearing members for their own account or the account of their clients. This is consistent with recording requirements set out in Article 14(3) of Commission Delegated Regulation No 2013/153[11]. This concept is therefore not compatible with a situation where the CCP would have procedures

[11] *'A CCP shall make, and keep updated, a record of the amounts of margins, default fund contributions and other financial resources referred to in Article 43 of Regulation (EU) No 648/2012, called by the CCP and the corresponding amount actually posted by the clearing member at the end of day and changes to that amount that may occur intraday, with respect to each single clearing member and client account if known to the CCP'*.

providing for just the record of this post-haircut value and where it would routinely impose such a decline in full in respect of every financial instrument that is posted to the CCP at the expense of clients.

CCP Question 3 [last update 4 February 2016]

Article 48 of EMIR – Default management

(a) *What is the requirement on a CCP for portability of client assets in a member default scenario – for both individual and omnibus accounts?*

1. *Port the "required collateral" only, less outstanding variation margin payments i.e. the value of assets used to cover liabilities; or*

2. *Port the assigned value of the assets, less outstanding variation margin payments (post-haircut); or*

3. *Port the proceeds from liquidation of assets, less outstanding variation margin payments; or*

4. *Port the assets themselves, less outstanding variation margin payments?*

(b) *Articles 48(5) and 48(6) of EMIR provide that, if a clearing member defaults, "the CCP shall, at least, contractually commit itself to trigger the procedures for the transfer of the assets and positions… to another clearing member designated by [the client or clients]…". They further provide that if porting of client positions "has not taken place for any reason within a predefined transfer period specified in its operating rules, the CCP may take all steps permitted by its rules to actively manage its risk in relation to those positions, including liquidating the assets and positions held by the defaulting clearing member for the account of its clients".*

How long should the predefined transfer period be, and can a CCP liquidate the client(s') position(s) and assets before the end of the predefined transfer period if it deems that necessary for risk management purposes?

(c) *Can a CCP require the client(s) to designate a back-up clearing member prior to the default of its primary clearing member as a precondition for triggering the procedure for porting in the event of the default of the primary clearing member?*

(d) *Article 48 of EMIR permits a CCP to liquidate the house positions of a defaulting clearing member and any client positions of that defaulting clearing member that the CCP has not been able to transfer to another clearing member.*

i) Is it permissible for the CCP to actively manage its risk in relation to the positions held in more than one account by one or more transactions, rather than being required to execute transactions to manage the risks of the positions held in each account separately?

ii) If it is acceptable for the CCP to execute one or more transactions to manage its risks across more than one account, how should the costs of the transactions be allocated between the affected accounts?

CCP Answer 3

(a) Article 48 of EMIR establishes the circumstances and parameters under which a CCP must transfer the assets and positions of the clients of defaulted clearing members or may liquidate such assets and positions.

Following a member default, a CCP is required to transfer the assets and positions recorded as being held for the account of the clients of the defaulted clearing member if the conditions defined in Article 48 are met. Otherwise, the CCP may try to transfer the assets and positions, on a best effort basis, but ultimately has the right to liquidate the assets and positions. If the assets of a client of the defaulted clearing members are only partially liquidated then the non-liquidated portion of the assets will be returned to the clients when they are known to the CCP or, if they are not, to the clearing member for the account of its clients.

Article 39(10) of EMIR provides that assets (in respect of segregation and portability) refers to collateral held to cover positions and includes the right to transfer assets equivalent to that collateral or the proceeds of the realisation of any collateral.

(b) Although EMIR does not specify a minimum (or maximum) for the predefined transfer period, it should be of sufficient length to enable the client(s) to make a request for porting, and for the CCP to trigger the porting as contemplated in Articles 48(5) & (6) of EMIR, within that period. Under Article 48(2) of EMIR a CCP "shall take prompt action to contain losses and liquidity pressures resulting from defaults and shall ensure that the closing out of any clearing member's positions does not disrupt its operations or expose the non-defaulting clearing members to losses they cannot anticipate or control". Furthermore, EMIR Recitals 49, 65 and 67 emphasise the importance of a CCP having robust risk management arrangements. Accordingly, a CCP can opt for a short pre-defined period if it judges that such would be necessary to liquidate client(s') position(s) and assets shortly after a clearing member default has occurred in order to contain losses or liquidity pressures. A CCP may extend the transfer period, however the legislator has indicated that liquidation should only take place following the end of a CCP's predefined transfer period and a CCP cannot liquidate client(s') position(s) and assets prior to the end of the predefined transfer period.

(c) Articles 48(5) and 48(6) of EMIR require that clients be able to designate another back-up clearing member upon request. It is not compatible with EMIR for a CCP to require that such designation has been made prior to the default of the client's primary clearing member as a precondition for the CCP triggering the procedure for porting. However if a client has not designated a back-up clearing member prior to the default of the client's primary clearing member and has not agreed that the CCP may choose a back-up clearing member for the client, then that may mean that porting is less likely to occur. Such a risk should be clearly disclosed by CCPs and clearing members; for example, as required by Article 39(7) of EMIR.

(d) In the event of the default of a clearing member, a CCP may liquidate (i) any house positions of the defaulting clearing members and (ii) any client positions of the defaulting clearing member that the CCP has been unable to transfer to a new clearing member within the predefined transfer period specified in the CCP's operating rules . To minimise its market risk, the CCP may hedge or replace such positions. Article 39(9) of EMIR requires that positions recorded in different accounts are not netted against each other and that assets covering the positions in one account are not exposed to losses connected to positions held in a different account.

i) In the event the CCP elects to hedge or liquidate positions that are recorded in more than one account (which may include client accounts), the CCP may assess that executing one or more transactions across accounts would be likely to result in a quicker or more efficient reduction in market and operational risk compared to hedging or liquidating the positions held in each account separately.

For example, it may be more operationally effective for the CCP to include all positions to be hedged or liquidated in an auction for which participating clearing members are requested to provide a single auction price covering all instruments and positions being auctioned. This reduction in risk will benefit both the CCP and the affected clients.

Accordingly, a CCP's operating rules may permit it to manage the risks present in more than one account through one or more transactions.

For the avoidance of doubt, this does not preclude the CCP from hedging or liquidating the positions held in each account separately, where this is provided for in its operating rules. In some circumstances, the CCP may assess this is likely to be a more effective way of managing the default.

ii) Where the CCP elects to hedge or liquidate positions across accounts through one or more transactions, it should allocate the costs of hedging or liquidation of the positions on the basis of the market value of the positions held in each account at the point the transaction or transactions were executed.

Any extra cost or gain which remains unallocated following this initial allocation process based on market value may be allocated pro rata on the basis of the risks presented to the CCP by each account that was subject to hedging or liquidation.

The methodology a CCP implements to allocate costs to each account in the event of the default of a clearing member should be publicly disclosed in accordance with Article 39(7) of EMIR.

CCP Question 4 [last update 5 August 2013]

Article 47 of EMIR – Deposit of financial instruments:

Article 47(3) of EMIR states that financial instruments posted as margins or as default fund contributions, shall, where available, be deposited with operators of securities settlement systems that ensure the full protection of those financial instruments. Alternatively, other highly secure arrangements with authorised financial institutions may be used.

(a) *Can a CCP deposit all financial instruments posted as margins or as default fund contributions in an account with a CSD through a custodian? The financial instruments would be deposited with a custodian who then registers them at the CSD in the name of a nominee of the custodian. Is this practice compatible with EMIR provisions?*

(b) *When can a security settlement system be considered unavailable for the purpose of Article 47(3) of EMIR?*

(c) *Can the term 'where available' be construed such that a securities settlement system would not be considered available where it does not offer to keep separate records and accounts enabling a CCP to distinguish, in accounts with the operators of the securities settlement system, the assets and positions held for the account of a client?*

(d) *Are the requirements of Article 47(3) of EMIR fulfilled where a CCP deposits financial instruments with CSDs (including ICSDs) that in turn deposit the instruments with other institutions via CSD links?*

(e) *Can a CCP outsource certain operational aspects of the accounts that the CCP holds (in its own name) at a securities settlement system?*

(f) *Do the requirements of Article 47(3) of EMIR apply only to financial instruments posted as margins or, default fund contributions, or also to financial instruments in which the CCP has invested, i.e. where margin or default fund contributions posted to the CCP in the form of cash are reinvested by the CCP in financial instruments?*

CCP Answer 4

(a) The operators of a securities settlement system are those notified under the Settlement Finality Directive (98/26/EC). Custodian banks are not generally operators of securities settlement systems. It should be noted that EMIR entered into force before the CSD Regulation and the term CSD is currently not defined in EU legislation.

Depositing financial instruments with an operator of a securities settlement system via a custodian does not constitutes a deposit with an operator of a securities settlement system for the purposes of Article 47(3) of EMIR. Such a structure would instead amount to a deposit with an authorised financial institution for the purposes of Article 47(3) of EMIR (assuming the custodian used is an authorised financial institution under Article 44 of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP requirements) and that the conditions defined in the same Article are respected to ensure that highly secured arrangements for the deposit of financial instruments are adopted).

(b) If a CCP is able to demonstrate that it cannot access a security settlement system that ensures the full protection of financial instruments, i.e. the protection of the CCP from custody risk (in a manner equivalent to the protection under the Settlement Finality Directive) and the protection of its clearing members and their clients from the default of the CCP or the protection of their clients from the default of their clearing members, then the CCP can deposit financial instruments through highly secured arrangements with authorised financial institutions subject to the provisions in Article 45(1) of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP requirements).

(c) Under Article 39 of EMIR, the requirement for individual segregation is a requirement that the CCP offer to keep separate records and accounts enabling a clearing member to distinguish in accounts with the CCP, the assets and positions held for the account of one or more clients.

Individual segregation within the meaning of Article 39(3) of EMIR applies to assets and positions held at CCP level. Hence, individual segregation does not have to be necessarily reflected at the level of the security settlement system or alternative highly secured arrangements with authorised financial institutions.

Therefore, a security settlement system that ensures the full protection of the financial instruments cannot be considered unavailable only because it does not offer individual segregation of client assets.

(d) Yes, provided that the CCP demonstrates to its competent authority that the arrangements do not prevent compliance with Article 47(3) of EMIR, namely that the CSD and the linked CSD ensure the full protection of the financial instruments.

(e) While the deposit of financial instruments under an arrangement whereby the account at the securities settlement system is held in the name of an authorised financial institution does not constitute a deposit with a securities settlement system for the purposes of Article 47(3) of EMIR, it is ESMA's understanding that third party service providers (such as custodian banks) may sometimes be used by CCPs to manage certain operational aspects of accounts that the CCP holds (in its own name) at a securities settlement system. CCP Answer 4(a) should not be read as preventing the continued use of such outsourcing arrangements.

EMIR explicitly contemplates that a CCP might outsource certain aspects of its operational functions, services or activities. Outsourcing of the operation of accounts that a CCP holds with a securities settlement system would be no different to the outsourcing of any other activity. Such outsourcing arrangements would of course be subject to the requirements for outsourcing which are prescribed in Article 35 of EMIR and subject to the restriction discussed above such that title to the account at the securities settlement system must be in the name of the CCP (this would entail the contractual relationship being between the securities settlement system and the CCP with the custodian acting as agent).

(f) The reference in Article 44(1) of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCPs) to Article 45 of the same RTS should be a reference to Article 43 of that Commission Delegated Regulation. Article 43 refers to Article 47(1) of EMIR, i.e. investment of the CCP's financial resources. This means that the requirement to deposit financial instruments with operators of security settlement systems where available, or with certain other institutions where not, applies to investments by the CCP that represent the reinvestment of margin and default fund contributions posted to the CCP in the form of cash.

CCP Question 5 [last update 20 March 2013]

Article 49 of EMIR – Review of models, Stress-testing and back-testing

(a) Stress-testing, back-testing and sensitivity analysis for new entities: What parameters, data and methodologies, time horizons should a new entity that applies for authorisation as CCP use in order to perform stress-testing, back-testing or sensitivity analysis, if the respective entity has no clearing members yet?

(b) Model validation for authorisation purposes: Is it compulsory for a CCP to conduct a comprehensive validation of models, methodologies and risk management framework before getting authorisation, in accordance with to Article 47 Model Validation (of the Commission delegated Regulation (EU) No 153/2013 of 19.12.2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 with regard to regulatory technical standards developed by ESMA on requirements for central counterparties)?

CCP Answer 5

(a) In the case of a new entity which has not performed any clearing activities before, the stress-testing, back-testing programmes or sensitivity analysis would be performed on the basis of the estimated positions/portfolios across all financial products proposed to be cleared by the CCP. Estimates made should meet the requirements set out in Article 47(5) of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP requirements) and the time horizon and set of data to be used by the CCP should be agreed together with the competent authority.

(b) Article 47 of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP requirements) supplements Article 49(1) of EMIR, pursuant to which a CCP must regularly review its models and parameters to ensure their reliability and resilience. Where the CCP intends to adopt any significant change to its models and parameters then it must obtain an independent validation of such changes and the validation of its NCA and of ESMA. The college of the CCP also needs to arrive at a joint opinion approving such changes, in accordance with Article 19 of EMIR. This is all set out in Article 49(1) of EMIR.

Article 41(2) of EMIR is also relevant. It provides that the models and parameters of a CCP must have been validated by a competent authority and approved by a joint opinion of the College, to be reached in accordance with Article 19 of EMIR.

The authorisation process under EMIR will likely ensure that the Article 41(2) requirements are met. In particular, the college joint opinion on the NCA's risk assessment of the CCP could also incorporate the college joint opinion on the NCA's validation of the CCP's models and parameters. Of course the NCA would need to present to the college its assessment on which such joint opinion can be based.

CCP Question 6 [last update 31 March 2015]

Article 14 of EMIR – Authorisation of a CCP:

(a) What constitutes an activity or service covered by the initial authorisation of a CCP as referred to in Article 15(1) of EMIR?

(b) By when must a CCP be fully compliant with EMIR?

(c) Can the clock be stopped on application deadlines when an NCA is waiting for further information from the CCP? Can the CCP continue operating under the national regime until a final decision has been made on its authorisation under EMIR?

(d) What services and activities can a CCP be authorised under EMIR to provide or perform?

(e) Is a CCP required to comply with all of the requirements laid down in EMIR for all of the services that it provides and activities that it performs?

(f) Can a CCP be authorised to provide a service that prevents its clearing members to clear contracts between each other?

CCP Answer 6

(a) Article 14(3) of EMIR provides that an authorisation shall specify the services or activities which the CCP is authorised to provide or perform including the classes of financial instruments covered by such authorisation. 'Classes of derivatives' is a defined term in EMIR and reference to 'classes of financial instrument' provides a guide as to granularity at which the services or activities authorised will be granted. Applying this definition to activities and services suggests that authorisation should be granted on the basis of activities or services which share a common risk profile. Therefore, an extension of authorisation would be needed where the CCP intends to undertake additional activities or services which expose the CCP to new or increased risks, e.g. on classes of financial instruments with a different risk profile or that have material differences from the CCP's existing product set.

As a practical example, a CCP might be authorised to clear single-name Credit Default Swaps contracts where the reference entities are corporate entities. In this example, the CCP would need to apply for an extension of authorisation where it intends to clear single-name Credit Default Swaps contracts where the reference entities are sovereigns or Credit Default Swaps contracts where the reference is an index.

(b) In order to continue to offer clearing services in the EU, CCPs must submit an application for authorisation to their NCA by 15 September 2013. The CCP is not required to be compliant with EMIR at this stage. However, its application must demonstrate clearly how it will become compliant before it receives authorisation. The NCA has thirty working days from the submission of the application to deem it complete or incomplete. If the NCA deems an application incomplete, it shall set a deadline by which the applicant CCP must provide the additional information. Once the NCA has deemed the application complete it has four months in which to submit a report to the college including an opinion on whether the CCP complies with EMIR. The opinion of the NCA and of the college could include conditions that the CCP needs to respect before the authorisation is granted.

(c) Until a decision is made on the authorisation of a CCP under EMIR, the respective national rules shall continue to apply, pursuant to Article 89(4) of EMIR. If the NCA deems an application incomplete, it shall set a deadline by which the applicant CCP must provide the additional information. The relevant deadlines pertaining to the review of a CCP's application for authorisation under EMIR (six months for a final decision, including one month for the establishment of a college and four months for a risk report to the college) do not begin until the CCP has submitted an application which the NCA deems complete, i.e. the 'clock' does not start until the application is considered to be complete. However, once the NCA has deemed an application complete, this constitutes confirmation that it has the information necessary to assess the CCP's compliance. As such, there is no possibility for it to 'stop the clock' once an application has been deemed complete.

Nevertheless, if an applicant CCP sought to prolong the transitional period indefinitely by failing to submit the required information, the NCA may conclude that this provides sufficient evidence to support a recommendation for refusal of the application for authorisation.

(d) Article 14(3) of EMIR provides that an authorisation decision under Article 14(1) shall specify the services or activities which a CCP is authorised to provide or perform. Article 14(3) also provides that an authorisation decision under Article 14(1) shall be granted only for activities linked to clearing. Article 2(3) of EMIR defines 'clearing' as the process of establishing positions (including the calculation of net obligations) and ensuring that financial instruments, cash, or both, are available to secure the exposures arising from those positions.

Therefore in order for an authorisation decision under Article 14(1) of EMIR to include the performance of a particular activity, that activity would need to present an objective link with the definition of "clearing" under Article 2(3) of EMIR.

It follows that under EMIR CCPs will not be able to provide services or perform activities which are not linked to clearing (such as auctioneer activities related to EU emission allowances).

This is without prejudice to Article 14(5) of EMIR which provides that an authorisation decision under Article 14(1) of EMIR shall not prevent Member States from adopting or continuing to apply, in respect of CCPs established in their territory, additional requirements including certain requirements for authorisation under Directive 2006/48/EC.

(e) Article 17(4) of EMIR provides that the competent authority shall grant authorisation only where it is fully satisfied that the applicant CCP complies with all of the requirements laid down in EMIR. This applies in respect of all of the services provided by a CCP and all of the activities performed by the CCP, including those which are considered as being linked to clearing.

Article 4(3) of Commission Delegated Regulation (EU) No 153/2013 provides that if a CCP provides services linked to clearing that present a distinct risk profile from its functions and potentially pose significant risks to it, the CCP shall manage those additional risks adequately. This is an additional requirement to that provided for in Article 17(4) of EMIR. Therefore where a CCP provides services or performs activities, which are considered as being linked to clearing and which present a distinct risk profile from its functions and potentially pose significant risks to the CCP, then the CCP is required to comply with all of the requirements laid down in EMIR (Article 17(4) of EMIR) and to ensure that it manages those additional risks adequately.

It follows that under EMIR CCPs will not be able to provide some of their services or perform some of their activities to standards which are below the minimum requirements established by Title IV of EMIR (such as guaranteeing the performance of market participants without collecting margins and/or without maintaining a default fund and dedicated own financial resources).

(f) No. CCPs cannot be authorised to offer services preventing the interposition of the CCP between clearing members, i.e. preventing clearing members to clear contracts with other clearing members.

CCP Question 7 [last update 4 June 2013]

Article 16 of EMIR – Capital:

Does a CCP have to hold capital for market risk on their investments?

In particular, market risk is required to be calculated on a CRD basis under Commission Delegated Regulation (EU) No 152/2013, and under that approach, assets may be treated as being held for the banking book rather than the trading book. For banking book assets, CRD only requires CCPs to hold capital against credit risk and not market risk.

CCP Answer 7

Under CRD, the classification of an investment asset under the banking or trading book depends on whether the bank has a trading intent with reference to that asset; positions held with a trading intent are those held intentionally for short-term resale and/or with the intention of benefiting from actual expected short-term price differences between buying and selling prices or from other price or interest rate variations.

In the case of a CCP the investments stemming from cash assets posted to the CCP as margins, default fund contributions, contributions to other financial resources or the portion of the CCP's own resources dedicated to the default waterfall in accordance with Article 45(4) of EMIR are not intended to be held with a trading intent to maturity; however, given that it is always the intention of a CCP that such assets would be liquidated in the event of a clearing member default, it is appropriate that these investments are capitalised against market risk.

With respect to the CCP's own capital (i.e. what it holds to meet its regulatory requirements under Article 16 of EMIR), instead, these investments might be held akin to the banking book of a CRD firm and therefore exempt from capitalisation for market risk.
CCP Question 8 [last update 31 March 2015]

Article 39 of EMIR – Segregation and portability:

Article 39(3) of EMIR states that: "A CCP shall offer to keep separate records and accounts enabling each clearing member to distinguish in accounts with the CCP the assets and positions held for the account of a client from those held for the account of other clients ('individual client segregation')". Article 39(10) of EMIR states that "Assets refer to collateral held to cover positions and include the right to the transfer of assets equivalent to that collateral or the proceeds of the realisation of any collateral...".

(a) Under Article 39(6) of EMIR, what is the definition of client requirement and excess margin? Will clearing members be obliged to post this margin directly at the CCP? Additionally, how should a clearing member allocate excess margin over various CCPs it is linked to?

(b) Does EMIR allow CCPs to offer unsegregated accounts in which the assets and positions of clearing members are not segregated from those held for the accounts of the clearing member's clients?

(c) At what time do clearing members have to comply with requirements on segregation and portability under Article 39 of EMIR?

(d) May a CCP meet the requirements of Article 39(3) of EMIR by identifying only the value of collateral due to a client; or is it necessary to identify the specific assets due to a client?

(e) Under Article 39(3) of EMIR, the requirement for individual segregation is a requirement that the CCP offer to keep separate records and accounts enabling each clearing member to distinguish in accounts with the CCP, the assets and positions held for the account of a client from those held for the account of other clients. Does individual client segregation require:

1. That assets be segregated at the level of the security settlement system (for financial instruments) or at the level of the central bank (for cash) or at the level of the authorised financial institution (where alternative highly secured arrangements are permitted)?

2. That payments associated with the positions of an individually segregated client (i.e. variation margin payments, premium payments, etc.) be recorded in the separate records and accounts maintained for the individually segregated client at the CCP?

(f) Article 39.9(c) of EMIR provides that assets covering the positions recorded in an account shall not be exposed to losses connected to positions recorded in another account.

1. *Can a CCP apply surpluses in a clearing member's house account to an omnibus client account or an individually segregated client account?*

2. *Can a CCP, with a clearing member's permission, use the clearing member's own assets (i.e. assets that were not posted by a client of the clearing member) to support the registration of client trades?*

(g) *Are CCPs expected to allow each clearing member to operate more than one house or omnibus client account under Article 39 of EMIR?*

(h) *Are CCPs required to provide segregated accounts for indirect clients?*

(i) *Are non-EU clearing members of EU CCPs providing services to clients subject to the segregation requirements in Article 39?*

(j) *Are EU clearing members of non-EU CCPs required to comply with Article 39 when offering client clearing on non-EU CCPs?*

(k) *Under Article 39(6) of EMIR, are clearing members obliged to post excess margin directly at the CCP if the collateral provided by the client is not eligible at the CCP? What if the margins collected by clients are in the form of a bank guarantee in favour of the clearing member?*

(l) *Can a CCP have a provision in its rules and/or operating procedures under which the CCP can, if so requested by a clearing member, transfer the positions and assets held for the account of a defaulted client of that clearing member from the segregated account holding those positions and assets into the house account of the clearing member to facilitate the management of the client default by the clearing member?*

(m) *Can a participant of a trading venue which is also a clearing member of the relevant CCP deny its clients the protections established under Article 39 of EMIR where it executes trades on behalf of its clients and subsequently clears those trades with the relevant CCP?*

(n) *If a CCP automatically pays variation margins in respect of an individually segregated client account to the clearing member each day (auto repay), is the clearing member required to return the collateral to the client?*

CCP Answer 8

(a) The terms 'client requirement' and 'excess margin' are not defined in EMIR. However, Article 39(6) of EMIR is clear that for individually segregated clients, any margin called from a client, which is over and above the amount called by the CCP to cover the positions of that client, must be posted to the CCP. The current practice of clearing members calling excess margin and retaining it is not permitted under EMIR for clients opting for individual segregation. Where a clearing member has collected additional margin in respect of particular client positions that has opted for individual client segregation, the excess margin should be passed to the CCP that clears those positions.

In the case where the relevant positions are with multiple CCPs, clearing members should ensure that the approach taken is made transparent to clients and where the clients opted for individual segregation, they will need to agree on the allocation of the excess margins to the different CCPs.

In the case where an individually segregated client has provided some assets to the clearing member that are not related to clearing activities at the CCP, then those assets do not have to be posted to the CCP if:

- the clearing member and the client have contractually agreed so in advance, and
- the assets are not dedicated to cover the current positions with the CCP and are clearly identified as such.

The two conditions above should be supported by appropriate documentation.

(b) No, EMIR does not allow the use of unsegregated accounts. Article 39(2) and 39(3) of EMIR provide that CCPs must offer both 'individual client segregation' and 'omnibus client segregation' (these terms being defined in Articles 39(2) and 39(3) of EMIR). While CCPs might offer other levels of protection in addition to individual client segregation and omnibus client segregation (e.g. an omnibus gross margin client model), omnibus client segregation is the minimum level of client protection that can be used under EMIR.

This is because Article 39(4) of EMIR requires that a clearing member distinguish, in accounts with the CCP, the clearing member's own assets and positions from those assets and positions held for the accounts of the clearing member's clients. Article 39(9) of EMIR includes further criteria which must be met by the accounts held by a clearing member with a CCP. These provisions are not compatible with the use of unsegregated accounts.

(c) The requirements on clearing members that are established in EMIR (e.g. those in Articles 38 and 39 of EMIR) apply to clearing members of all CCPs established in the European Union. These obligations therefore come into force at and should be met by the time that the CCP is authorised under EMIR.

(d) In the case of a default of a clearing member, Article 48(6) of EMIR requires that a CCP's model of individual segregation provides for the transfer of the assets and positions held for the account of an individually segregated client to another clearing member or provides for the CCP to actively manage its risks in relation to those positions, including liquidating the assets and positions. Where the transfer of the assets and positions held for the account of an individually segregated client to another clearing member does not take place then, pursuant to Article 39(9) of EMIR, the CCP's model of individual segregation should ensure that the assets recorded in the individually segregated account are not exposed to losses connected to positions recorded in another account. Accordingly it is not sufficient that the account at the CCP identifies only the value due to the account of the client. It must identify the specific assets (e.g. the particular or equivalent securities) due to the account of the client.

Alternative approaches to segregation that identify only the value due to the accounts of the clients (while recording the assets provided for the account overall) may be offered in addition, provided they meet the relevant requirements of Article 39 of EMIR, but they do not meet the requirement to offer individual client segregation.

(e)(1) Individual segregation within the meaning of Article 39(3) of EMIR applies to assets and positions held at CCP level. Hence, individual segregation does not have to be necessarily reflected at the level of the security settlement system, central bank or alternative highly secured arrangements with authorised financial institutions. However, it should be noted that Article 47(5) requires that assets belonging to the CCP should be distinguished from assets belonging to clearing members when deposited with a third party.

(e)(2) Article 14(3) of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCPs) requires that a CCP shall make, and keep updated, a record of the amounts of margins called by the CCP and the corresponding amount actually posted by the clearing member with respect to each individually segregated client account. Variation margin payments, representing amounts of margins called by the CCP are therefore required to be recorded in the separate records and accounts maintained for the individually segregated client at the CCP. However, this requirement does not imply that payment instructions must be made for every individually segregated account separately. CCPs may therefore issue one payment instruction for multiple accounts at the same time, so long as they issue separate margin calls for each account (house, omnibus client, individually segregated client account) and correctly record these margin calls, and the payments which correspond to them, in the records of each account.

(f)(1) The objective of the provisions in Article 39 of EMIR is to ensure that clients of clearing members are granted a high level of protection[12]. Furthermore, Article 45 of EMIR provides that a CCP shall use the margins posted by a defaulting clearing member prior to other financial resources when covering losses.

CCPs are therefore permitted to have rules and procedures which facilitate the use of surplus margin on a defaulted clearing member's house account (that would otherwise have been payable by the CCP to the estate of the clearing member) to meet any obligation of the clearing member in respect of losses on a client account of that clearing member.

For the avoidance of doubt, surplus margin on a client account of a defaulted clearing member cannot be used to meet any losses on the defaulted clearing member's house account(s).

(f)(2) Articles 39(4) and 39(9)(a) of EMIR require that clearing members distinguish their own assets in separate accounts at the CCP from those assets held for the account of their clients.

Where a clearing member desires to use its own assets (i.e. assets that were not posted by a client of the clearing member) to fulfil the margin requirements of the client account, then such assets could be recorded in a client account at a CCP, however in doing so the assets would be treated as assets held for the account of clients of the clearing member. This would mean that

[12] *See Recital 64 of EMIR.*

upon a default of the clearing member, the assets would be exposed to losses connected to the client account in which the assets were recorded and could no longer be used to meet any losses on the defaulted clearing member's house account(s).

(g) Article 39(2) of EMIR requires CCPs to offer to keep separate records and accounts (in the plural) enabling each clearing member to distinguish in accounts (in the plural) with the CCP the assets and positions of the clearing member from those held for the account of its clients ('omnibus client segregation'). Article 39(3) of EMIR requires that upon request CCPs shall offer clearing members the possibility to open more accounts in their own name or for the account of their clients. CCPs are therefore expected to offer clearing members the possibility to open more than one omnibus client account, when requested to do so.

(h) Article 3(1) of RTS 149/2013 (RTS on OTC derivatives) requires a CCP to set up, on the request of a clearing member, accounts to enable the assets and positions of the client to be recorded separately from the assets and positions of the indirect clients of the client. Accordingly, at the request of a clearing member, the CCP must, at a minimum, set up an omnibus segregated account in which only the positions and assets of the indirect clients of a client may be recorded. The CCP may also, at the request of a clearing member, set up individually segregated accounts in which the positions and assets of indirect clients of a client may be recorded, but there is no obligation to do so.

(i) Under Article 39(5), clearing members must offer their clients, at least, the choice between omnibus client segregation and individual client segregation and inform them of the costs and level of protection associated with each option. The references to clearing members in Article 39 are not limited to EU clearing members, so all clearing members of EU CCPs are required to comply. Similarly, the references to clients in Article 39 are not limited to EU clients. CCPs are expected to require all clearing members to comply with the relevant EMIR provisions through their rules.

In the case that a third country insolvency regime applicable to a clearing member could interfere with the provision of omnibus client segregation or individual client segregation, including intrinsic client protections, in the manner set out in Articles 39 and 48, the clearing member should offer its clients alternative possibilities that ensure those clients receive, at least, the choice of omnibus client segregation and individual client segregation. Alternative possibilities may include clearing solutions provided by an affiliate or other clearing member of the CCP.

When, notwithstanding the alternatives offered, the client chooses to use the third country clearing member and risks remain due to the third country insolvency regime, the clearing member must disclose those risks in full to the client at the outset of the relationship, in accordance with both Articles 39(5) and 39(7)).

(j) No but EU clearing members will only be allowed to be a clearing members of a non-EU CCP which has been recognised as meeting equivalent requirements to EMIR under the process set out in Article 25. This will include an assessment of the CCP's segregation arrangements.

(k) Where a client that has opted for individual client segregation provides a clearing member with additional margin which is not eligible collateral at the CCP, then the clearing member does not have an obligation to transform such additional margin into eligible collateral. The CCP has no obligation to accommodate this collateral however the clearing member should pass such additional margin to the CCP if the latter has the operational and technical means to receive it. However, under no circumstances would such additional margin be eligible to meet margin calls made by the CCP.

Where the collateral provided by the client is a bank guarantee in favour of the clearing member then the clearing member is not required to post to the CCP an amount of eligible collateral equal to the value of the bank guarantee that exceeds the margin called from the client by the clearing member.

(l) It is the responsibility of the clearing member to inform the CCP of the account to which positions and assets held by the clearing member should be allocated. The contractual arrangement between a clearing member and its client may provide for the positions and assets held for the account of the client to be transferred to the house or proprietary account of the clearing member in the event of a default of the client. Accordingly, there should be no restriction on the ability of a CCP to transfer the positions and assets held for the account of a defaulted client into the house account of the clearing member on instruction of that clearing member, subject to that clearing member not being in default itself and in accordance with any applicable valuation and other rules and/or operating procedures of the CCP. This existence of such a process should be clearly disclosed by CCPs and clearing members; for example, as required by Article 39(7) of EMIR and would need to be compatible with the applicable insolvency law.

(m) No, even if the client does not have an explicit contractual relationship covering the clearing of these trades.

Article 2(1)(15) of EMIR provides that a 'client' is "an undertaking with a contractual relationship with a clearing member of a CCP which enables that undertaking to clear its transactions with that CCP". Given that the trade is cleared by a CCP, then the contractual relationship entered into by the client enables the clearing of the transaction with the CCP. Therefore, even if the contractual arrangement governing the provision of trading services does not explicitly cover the provision of clearing services by the firm executing the trade on behalf of its client, the latter should be considered a client under EMIR and should benefit from the client protections established therein.

(n) According to article 39(6) of EMIR, when a client opts for individual segregation any margin in excess of the client's requirement shall be posted to the CCP. As such, any excess collateral allocated to an individually segregated account must either be maintained at the CCP in accordance with article 39(6) or returned to the client. CCPs should offer clearing members the possibility of holding excess margin allocated to an individually segregated account at the CCP in that account (i.e. switching off auto repay), provided that the CCP can hold the currency in which the cash variation margin is denominated overnight in compliance with the CCP's investment policy.

When variation margins are denominated in currencies that the CCP cannot hold overnight (e.g. because it has no overnight investment facilities for such currencies - typically, currencies not accepted for initial margins), consistent with CCP answer 8k, the CCP has no obligation to accommodate these currencies and the clearing member is required to return the collateral to the client, unless the latter , via a documented request, instructed the clearing member to hold the client's repaid variation margins in a non-clearing account meeting the conditions in answer 8a.

CCP Question 9 [last update 3 December 2018]

Article 41 of EMIR – Margin requirements:

(a) Under a cross-margining arrangement, two (or potentially more) CCPs set margin requirements on the basis of the portfolio of positions that a clearing member holds across the two CCPs. Is

this approach consistent with the requirements of EMIR and the associated Commission Delegated Regulations?

(b) *Article 24(1) of Commission Delegated Regulation (EU) No 153/2013 establishes the confidence intervals that a CCP shall at least respect in calculating the initial margins, over the time period defined in Article 25 of Commission Delegated Regulation (EU) No 153/2013 and assuming a time horizon for the liquidation of the position as defined in Article 26. Is the CCP obliged to respect the same confidence intervals if, for the purpose of margin calculations, it uses different time horizons, in addition to those prescribed in Articles 25 and 26 of Commission Delegated Regulation (EU) No 153/2013?*

[13]CCP Answer 9

(a) Although EMIR does not directly address cross-margining, there are a number of provisions in EMIR and Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP requirements) applicable to CCPs that need to be considered for the feasibility of cross-margining arrangements. In this respect, Article 41 of EMIR is particularly relevant to consideration of cross-margining arrangements: a CCP must secure exposures with margin and a claim on, or guarantee from, another CCP cannot substitute for that. Other relevant provisions within EMIR that would require consideration are Article 45 of EMIR (Default Waterfall) which provides that margins must be used to cover the losses of 'the CCP' – i.e. margins cannot be used to cover the losses of another CCP; Article 47 of EMIR (Investment Policy) which provides (in conjunction with Article 44 of the RTS on CCP requirements) for limited circumstances in which a CCP might not place collateral received as margin with the operator of a security settlement system (see CCP Question 4); Article 39 of EMIR (Segregation and Portability) which provides that clearing member and client positions and assets must be recorded in the accounts of 'the CCP' – i.e. they cannot be recorded in the accounts of another CCP as an alternative.

Where it is not margin but the CCP's own capital that is being used to provide the guarantee to another CCP under a cross-margining arrangement, then the CCP would likely need to capitalise that guarantee under the provisions of the RTS on CCP requirements (as an exposure not covered by financial resources under Articles 41 to 45 of EMIR).

(b) Article 24 of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP requirements) establishes that a CCP shall calculate the initial margins to cover the exposures arising from market movements for each financial instrument that is collateralised on a product basis, over the time period defined in Article 25 of the RTS on CCP requirements and assuming a time horizon for the liquidation of the position as defined in Article 26 of the RTS on CCP requirements, respecting at least the confidence intervals of 99,5% for OTC derivatives and 99% for other financial instruments.

Article 25 of the RTS on CCP requirements, establishing the minimum requirement on time horizon for the historical volatility, specifies that it should be calculated based on data covering at least the latest 12 months. Similarly, Article 26 of the RTS on CCP requirements establishes the minimum requirement for the liquidation period, that being at least five business days for OTC derivatives and two business days for other financial instruments.

The CCP is expected to calculate the minimum amount of margin required by EMIR on the basis of these criteria, subject to Articles 26(4) and 25(2) of the RTS on CCP requirements which permit a CCP to use different time horizons, both for the calculation of historical volatility and the liquidation period, in certain circumstances.

In this case, the CCP is not obliged to apply the minimum confidence intervals defined in Article 24 of the RTS on CCP requirements, as they specifically apply to the requirements under Articles 25 and 26 of the RTS on CCP requirements. Nevertheless, the CCP shall assure that, in any case, the resulting margin amount is equal or higher than the one calculated in accordance with all of the parameters defined in Articles 24 to 28 of the RTS on CCP requirements.

CCP Question 10 [last update 4 June 2013]

Article 14 of EMIR – Outsourcing:

According to Article 11(1) of Commission Delegated Regulation (EU) No 153/2013 'a CCP shall establish and maintain an internal audit function which is separate and independent from the other functions and activities …'. Is it allowed by the CCP to outsource an internal audit function according to Article 35 of EMIR?

CCP Answer 10

A CCP might outsource its internal audit function where the requirements of Article 35 of EMIR are met. Internal Audit should be considered a "major activity linked to risk management" in the language of EMIR Article 35(1), so outsourcing this would require the specific approval of the competent authority. In addition, EMIR establishes a number of specific requirements for the internal audit function which would need to be met under any outsourcing arrangement. In particular, Article 7(6) of Regulation (EU) No. 153/2013, requires that a CCP have clear and direct reporting lines between the internal audit function and the board and senior management of the CCP. Article 11(3) of Regulation (EU) No. 153/2013 also requires a CCP's internal audit function have the necessary access to information in order to review all of the CCP's activities and operations, processes and systems, including outsourced activities. Both of these requirements would need to be carefully considered and respected where a CCP sought to outsource its internal audit function.

CCP Question 11 [last update 11 February 2014]

Article 47 of EMIR – Investment Policy:

(a) *What is the possible duration of the "highly secured arrangements" to be used for maintaining cash other than with a central bank?*

(b) *Article 45 (1) of* Commission *Delegated Regulation (EU) No 153/2013 ('Highly secured arrangements maintaining cash') states that if cash is not deposited with a central bank then it must be* *deposited with "an authorised credit institution as defined under Directive 2006/48/EC..." or with "a third country financial that is subject to and complies with prudential rules considered by the competent authorities to be at least as stringent...". Article 45(2) of Commission Delegated Regulation (EU) No 153/2013 states that "not less than 95% of such cash" shall be deposited through "arrangements that ensure the collateralisation of the cash with highly liquid financial instruments...". Is the counterparty to such a collateralisation arrangement required to be an entity which meets the criteria under Article 45(1) of Commission Delegated Regulation (EU) No 153/2013?*

(c) *Is it permissible for a CCP to refuse to indemnify (or exclude liability to) clearing members or clients against losses incurred due to the default of a central bank, authorised credit institution or equivalent third country financial institutions (in the case of cash), or the operator of a securities settlement system or authorised financial institution (in the case of the financial instruments) holding clearing member or client assets (or other CCP assets representing the reinvestment of such assets by the CCP)?*

CCP Answer 11

(a) *Article 45(2) of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP require-*ments) provides that where cash is deposited other than with a central bank in accordance with Article 47(4), and is maintained overnight, then not less than 95% of such cash must be deposited through arrangements that ensure the collateralisation of the cash with highly liquid financial instruments meeting the requirements in Article 43 of the same Regulation, for example, through repo transactions.

There is no imposed limitation on the duration of such repo transactions, to the extent that the requirement under Article 32(3)(b) of Commission Delegated Regulation (EU) No 153/2013 is respected. CCPs can maintain cash under highly secured arrangements with a maturity longer than overnight. Nor are there limitations on the time-to-maturity of the financial instruments received as collateral for the cash, pursuant to Article 45(2) and Annex II of Commission Delegated Regulation (EU) No 153/2013. From a liquidity risk point of view, the use of a highly secured arrangement does not introduce any additional risk over and above the one that would be present if the CCP invested in the highly liquid financial instrument directly. Recital 46 of Commission Delegated Regulation (EU) No 153/2013 provides that in securing its cash, CCPs should always ensure that they are always adequately protected against liquidity risk.

As provided for under Article 45(2) of the Commission Delegated Regulation (EU) No 153/2013, the financial instruments received as collateral should meet the same requirements as the one in which the CCP is allowed to invest. This includes the conditions for the deposit of these instruments (see Q&A CCP no. 4).

(b) No. The collateralisation arrangement should be concluded with an authorised financial institution pursuant to Article 47(4) of EMIR.

Given that the cash will always be deposited with an entity meeting the criteria under Article 45(1) of Commission Delegated Regulation (EU) No 153/2013, and collateralised with financial instruments meeting the requirements under Article 44 of Commission Delegated Regulation

(EU) No 153/2013, then the CCP will not be exposed to principal risk with regards to the counterparty with which the CCP has collateralised its cash.

(c) Yes, EMIR does not require CCPs to indemnify clearing members or clients against such a loss. However, the extent of the CCP's responsibility should be clearly stated or disclosed by the CCP; for example, as required by Article 39(7) or 38(2) of EMIR or Article 10 of Commission Delegated Regulation (EU) No 153/2013.

CCP Question 12 [last update 11 February 2014]

Article 42 of EMIR – Default Fund:

(a) Articles 42(2), 42(3) and 43(2) of EMIR require each CCP to hold financial resources including a default fund sufficient in size to cover losses arising from the default of the two largest members. However the CCP has the right in a default to transfer the positions of clients with porting arrangements to other clearing members. For the purposes of calculating the size of its default fund(s) and members' contributions, can a CCP exclude those client positions that are held in segregated and portable accounts?

(b) Article 30 of Commission Delegated Regulation (EU) No 153/2013 requires that "when implementing an internal policy framework for defining the types of extreme but plausible market conditions that could expose the CCP to greatest risk, a CCP shall specify (for each market to which a CCP is exposed in a clearing member default scenario) extreme but plausible conditions based at least on… (a) a range of historical scenarios… that would have exposed the CCP to greatest financial risk; and (b) a range of potential future scenarios… drawing on both quantitative and qualitative assessments of potential market conditions".

1. *Is a CCP required to exactly replicate actual historical events in order to satisfy the requirement to use a range of historical scenarios or can a CCP use only quantitative and qualitative scenarios which are generated based on statistics derived from historical price changes?*

2. *When replicating actual historical events is a CCP required to exactly replicate actual historical price changes in all cleared instruments or can a CCP approximate prices moves based on similar instruments or market indices?*

CCP Answer 12:

a) ESMA has considered the argument for not including certain client positions when calculating the size of the default fund to be that these client positions would not be impacted by the default of the clearing member because they are expected to be ported to another clearing member. However, these client positions might have an effect on the overall position of the clearing member, i.e. the default of one or more clients could increase the likelihood of default of the clearing member. Excluding these positions from the calculation of the size of the default fund could therefore expose the CCP to uncovered risks and this is contrary to the objectives of EMIR.

Furthermore, it is possible that client positions would not be ported but would be liquidated by the CCP and it is possible that some of the clients of one of the CCP's two largest clearing members would expect to port their positions to the other largest clearing member, which would not be possible where those two largest clearing members default concurrently.

Excluding client positions from the calculation of the size of the default fund could therefore expose the CCP to uncovered risks and is contrary to the objectives of EMIR.

(b.1) A CCP is required to specify extreme but plausible conditions based on a range of historical scenarios and additionally a range of potential future scenarios. The range of potential future scenarios is required to draw on quantitative and qualitative assessments of potential market conditions.

Both sets of scenarios must be developed and applied (historical scenarios and potential future scenarios drawing on quantitative and qualitative assessments). The use of statistics derived from historical price changes alone would not satisfy the requirement to use a range of historical scenarios.

When defining its potential future scenarios a CCP might include the use of statistics derived from historical price changes. However, the CCP would still need to include quantitative and qualitative assessments in the development of its potential future scenarios.

(b.2) A CCP might use similar instruments or market indices as a proxy for actual historical price changes so long as such proxies are carefully documented, validated and ensure that no relevant historical price changes have been excluded.

CCP Question 13 [last update 21 May 2014]

Article 26 of EMIR – Organisational requirements:

a) *Article 3(3) of Commission Delegated Regulation No 2013/153 requires a CCP to ensure that the functions of the chief risk officer, chief compliance officer and chief technology officer are carried out by different individuals and provides that these positions shall be held by employees of the CCP entrusted with the exclusive responsibility of performing these functions. Can these officers have other duties in addition to taking responsibility for the risk, compliance and technology functions respectively?*

b) *Pursuant to Article 3(2) of RTS 153/2013, a CCP shall not share its staff with other group entities, unless under the terms of an outsourcing arrangement in accordance with Article 35 of EMIR. Does the term "staff" extend to the senior management of the CCP (for example the chief executive officer of the CCP) or is it limited to those individuals with clerical or administrative roles*

CCP Answer 13

a) Recital 13 of Commission Delegated Regulation No 2013/153 explains that the rationale for requiring CCPs to have at least a chief risk, chief compliance and chief technology officer is to ensure that CCPs operate with the necessary level of human resources, are accountable for the performance of their activities, and provide competent authorities with relevant contact points.

   The reference to "exclusive responsibility" in Article 3(3) of Commission Delegated Regulation No 2013/153 should be read in light of this recital. In particular, "exclusive responsibility" pertains to the fact that one single individual should have sole responsibility for the function of risk, another distinct individual should have sole responsibility for the function of compliance and a third distinct individual should have sole responsibility for the function of technology. "Exclusive responsibility" does not require that these individuals only undertake duties pertaining to their role as the chief risk, compliance or technology officer.

   However, it should be carefully considered before these individuals take on any duties outside of the scope of the risk, compliance or technology functions to ensure that the individual is indeed appropriately dedicated to the function for which they are responsible.

b) In line with other European legislation, the term "staff" encompasses any person working for the CCP who is directly engaged in the services or activities which the CCP is authorised to provide or perform, and any natural person directly managing or supervising such persons. In particular, the Chief Executive Officer, although being a member of the board, is directly managing the CCP and therefore the provisions applicable to the staff should apply to the Chief Executive Officer.

   Where a CCP maintains a two-tiered board system, the term "staff" does not encompass the members of the supervisory board.

CCP Question 14 [last update 5 August 2013]

Article 2 of EMIR – Definitions:

Article 2(28) of EMIR provides that an "independent member" of the board means a member of the board who has no business, family or other relationship that raises a conflict of interests regarding the CCP concerned or its controlling shareholders, its management or its clearing members, and who has had no such relationship during the five years preceding his membership of the board. If a board member is considered independent in respect of the parent company of a CCP (according to the definition under Article 2(28) of EMIR), can this person also fulfil the requirements for being an independent board member of the CCP?

CCP Answer 14:

An independent director of the parent company of a CCP might be considered to satisfy the criteria for appointment as an independent director of a CCP; however this is not automatic and should be analysed properly. In particular, it would need to be carefully considered as to whether the individual's relationship with the parent company of the CCP raised a conflict of interest regarding the CCP. For example, the individual would likely owe duties to the parent company of the CCP and be required to act in the best interests of that company. These interests and duties might conflict with the interests of the CCP.

Article 3(4) of the RTS on CCPs also requires that "a CCP that is part of a group shall take into account any implications of the group for its own governance arrangements including whether it has the necessary level of independence to meet its regulatory obligations as a distinct legal person and whether its independence could be compromised by the group structure <u>or by any board member also being a member of the board of other entities of the same group...</u>"

CCP Question 15 [last update 5 August 2013]

Article 35 RTS on CCPs – Allocation of additional resources

Where a CCP has established more than one default fund for the different classes of financial instruments it clears, is it compulsory under Article 35(3) of Commission Delegated Regulation No 153/2013 for the total amount of dedicated own resources referred to in Article 35(1) of Commission Delegated Regulation No 153/2013 to be allocated to each of the default funds in proportion to the size of each default fund, or just the minimum own resources required under Article 35(2) of Commission Delegated Regulation No 153/2013? In other words, can the CCP choose to allocate additional own resources above the minimum fungibly or must it allocate any additional own resources to specific default funds? If so, must it be allocated in the same proportion as it allocates the minimum amount?

CCP Answer 15

Article 35(3) of Commission Delegated Regulation No 153/2013 specifies that the minimum amount (as calculated according to Article 35(2) of Commission Delegated Regulation No 153/2013) of dedicated own resources referred to in Article 35(1) of Commission Delegated Regulation No 153/2013 must be allocated to each of the default funds in proportion to the size of each default fund. Article 35(3) of Commission

Delegated Regulation No 153/2013 states that the amount allocated to a given default fund may be used only against defaults arising in the market segments to which that default fund refers, and not against defaults arising in market segments to which other default funds refer. Any amount of dedicated own resources contributed to the default waterfall in excess of this minimum amount does not need to be allocated to a specific default fund and may be allocated across the different default funds and in a different proportion to the minimum amount.

CCP Question 16 [last update 11 February 2014]

Article 38 of EMIR – Transparency

(a) EMIR Article 38(3) states that "a CCP shall disclose to its clearing members and to its competent authority the price information used to calculate its end-of-day exposures to its clearing members". In some cases, particularly for OTC products, the final prices used to value trades may be combined from different sources, for example quotes from different market participants. Should CCPs also disclose these intermediate price inputs?

(a) EMIR Article 38(1) states that "a CCP and its clearing members shall publicly disclose the prices and fees associated with the services provided". What are the criteria for considering that the prices and fees are publicly disclosed?

(b) EMIR Article 38(5) states that "a CCP shall publicly disclose any breaches by clearing members of the criteria referred to in Article 37(1) and the requirements laid down in paragraph 1 of this Article" (i.e. Article 38 of EMIR). Through which tool should the CCP disclose this information?

(c) Article 38(1) of EMIR states that "a CCP and its clearing members shall publicly disclose the prices and fees associated with the services provided". What information regarding prices and fees must CCPs and clearing members actually disclose in order to meet the requirement to "disclose fees and prices associated with the services provided"? In particular, do CCPs and clearing members need to publish a numerical figure or would a narrative or qualitative discussion of the factors that will drive prices and fees meet the requirement under Article 38(1) of EMIR? Furthermore, should the publicly disclosed prices and fees be those for a brand new client with no history, the average prices and fees across all clients or the lowest prices and fees charged to a client?

CCP Answer 16

(a) Yes, the CCP should disclose such intermediate price inputs to clearing members and competent authorities, as this is part of the relevant price information used to calculate end-of-day exposures. It does not need to disclose the identity of the firms providing the quotes if this is subject to restrictions on grounds of confidentiality.

(b) The prices and fees should be considered as publicly disclosed when they are published on the CCP's and the clearing members' respective websites. Public disclosure, including in accordance with articles 38(1) and 39(7) is expected to include publication on a firm's website in an easily identifiable location on a page without any access limitations.

(c) The CCP should publish on its website the breaches made by clearing members of the criteria referred to in Article 37(1) of EMIR, by identifying at least the relevant clearing member, except in the cases indicated in Article 38(5) of EMIR. The CCP should constantly monitor that its clearing members comply with the requirements laid down in Article 37(1) of EMIR.

(d) CCPs and clearing members need to publish numerical figures in order to meet the requirement to "disclose fees and prices associated with the services provided" as set out in Article 38(1) of EMIR. A narrative or qualitative discussion of the factors that will drive prices and fees is not enough. The numerical figures published should at least include those for a brand new client and accompanying this should be a list of the various discounts or rebates available to clients and the factors that would qualify a client to receive such discounts or rebates.

The text of Article 38(1) of EMIR provides that a CCP and its clearing members shall publicly disclose the 'prices and fees of each service provided separately, including discounts and rebates and the conditions to benefit from those reductions'. In order to meet this requirement the information publicly disclosed must enable potential clients to establish a reasonable estimate in a manner that enables them to compare the cost of clearing with different CCPs and clearing members – publishing a narrative or qualitative discussion of prices and fees would not satisfy this requirement. Similarly, publishing only the average prices and fees across all clients or the lowest prices and fees charged to a client would not satisfy this requirement.

CCP Question 17 [last update 11 February 2014]

Article 43(3) and 48(2) of EMIR – Limited exposures of Clearing Members

Can a CCP have provisions in their rules under which non-defaulting clearing members can be called for additional funds in the event of a default of another clearing member where:

1. *The size of the additional contribution is limited to a pre-defined monetary amount (e.g. an assessment of up to EUR XX million per clearing member)?*

2. *The size of the additional contribution is limited to an amount which is relative to the exposure that the clearing member brings to the CCP (e.g. an assessment of up to X times the clearing member's prefunded default fund contribution)?*

3. *There is no pre-defined monetary or relative limit on the size of the additional contribution?*

CCP Answer 17

EMIR provides that a CCP may require non-defaulting clearing members to provide additional funds (in addition to their prefunded default fund contribution) in the event of a default of another clearing member. However, this provision is caveated by a requirement that the clearing members have limited exposures toward the CCP (Article 43(3) of EMIR). EMIR also provides that a CCP shall ensure that the closing out of any clearing member's positions does not expose the non-defaulting clearing members to losses that they cannot anticipate or control (Article 48(2) of EMIR).

1. It is compatible with EMIR for a CCP to have provisions in its rules under which non-defaulting clearing members can be called for additional funds in the event of the default of another clearing member and where the size of the additional contribution is limited to a pre-defined monetary amount. In particular the losses to which non-defaulting clearing members are exposed are pre-defined and such losses can be controlled to the extent that the clearing member can reduce the exposure that it has to the CCP. Such exposures are therefore limited on the basis that they can both be anticipated and controlled.

2. It is compatible with EMIR for a CCP to have provisions in its rules under which non-defaulting clearing members can be called for additional funds in the event of the default of another clearing member and where the size of the additional contribution is relative to the exposure that the clearing member brings to the CCP. In particular the losses to which non-defaulting clearing members are exposed can be calculated as they are a function of the aggregate positions cleared by those clearing members and such losses can be controlled to the extent that the clearing member can reduce the aggregate positions that it clears with the CCP. Such exposures are therefore limited on the basis that they can both be anticipated and controlled.

3. Where the exposures of the non-defaulting clearing members toward the CCP can be calculated by those clearing members in advance it would be compatible with EMIR for a CCP to have provisions in its rules under which non-defaulting clearing members can be called for additional funds in the event of the default of another clearing member even where there is no pre-defined monetary or relative limit on the size of the additional contribution.

   This may be the case if clearing members can anticipate the potential size of the additional funds that they might be called for in the event of the default of another clearing member to the extent that the aggregate positions cleared by a CCP are able to be modelled with reasonable confidence and the clearing members can anticipate their proportional contribution to the aggregate positions cleared by the CCP based on their contribution to the default fund, as known to clearing members through the transparency provisions in EMIR.

   In this case the losses to which non-defaulting clearing members are exposed can be calculated by those clearing members and such losses can be controlled to the extent that the clearing member can reduce the exposure that it brings to the CCP. Such exposures are therefore limited on the basis that they can both be anticipated and controlled.

CCP Question 18 [last update 11 February 2014]

Article 45(4) of EMIR – Use of margins posted by non-defaulted Clearing Members

(a) Can a CCP have provisions in their rules under which the CCP can reduce pro-rata the amount of variation margin it is due to pay clearing members with a positive change in their positions in order to cover losses resulting from the default of another clearing member (variation margin haircutting) where:

   1. The variation margin reduction is limited to a pre-defined monetary amount (e.g. an assessment of up to EUR XX million per clearing member)?

2. *The variation margin reduction is limited to an amount which is relative to the exposure that the clearing member brings to the CCP (e.g. an assessment of up to X times the clearing member's prefunded default fund contribution)?*

3. *There is no pre-defined monetary or relative limit on the size of the variation margin reduction?*

b) *Can a CCP have provisions in their rules under which the CCP can use margins posted by a non-defaulting clearing member to cover a liquidity shortfall resulting from the default of a clearing member?*

CCP Answer 18

a) EMIR provides that a CCP shall not use the margins posted by non-defaulting clearing members to cover losses resulting from the default of another clearing member (Article 45(4) of EMIR). However, while variation margin represents an amount of margin for the purpose of Article 39 of EMIR (i.e. it is required to be recorded in the separate records and accounts maintained for individually segregated clients as set out in CCP Question 8(2)(e)), such margin represents a payment flow between the counterparties of the original contract and does not represent margin posted by clearing members for the purpose of Article 45(4) of EMIR. Article 45(4) is therefore not applicable. It is compatible with EMIR for a CCP to reduce the amount of variation margin that it is due to pay clearing members with a positive change in their positions in order to cover losses resulting from the default of another clearing member.

EMIR also provides that the clearing members of a CCP shall have limited exposures toward the CCP (Article 43(3) of EMIR) and that a CCP shall ensure that the closing out of any clearing member's positions does not expose the non-defaulting clearing members to losses that they cannot anticipate or control (Article 48(2) of EMIR). Therefore, it is compatible with EMIR for a CCP to have provisions in its rules under which the CCP can reduce the amount of variation margin that it is due to pay clearing members with a positive change in their positions in order to cover losses resulting from the default of another clearing member and where:

1. the variation margin reduction is limited to a pre-defined monetary amount

2. the variation margin reduction is relative to the exposure that the clearing member brings to the CCP.

3. there is no pre-defined monetary or relative limit on the variation margin reduction.

In the first case, the losses to which non-defaulting clearing members are exposed are pre-defined and such losses can be controlled by the clearing member reducing the exposure that it has to the CCP.

In the case of 2 and 3 above, the losses to which non-defaulting clearing members are exposed can be calculated as they are a function of the aggregate positions cleared by those clearing members and such losses can be controlled by the clearing member reducing the aggregate positions that it clears with the CCP.

In the three cases above, the exposures are limited on the basis that they can both be anticipated and controlled.

b) EMIR provides that a CCP shall not use the margins posted by non-defaulting clearing members to cover losses resulting from the default of another clearing member (Article 45(4) of EMIR). However, the reuse of margins posted by a non-defaulting clearing member to cover a liquidity shortfall resulting from the default of a clearing member (e.g. the CCP using financial instruments posted as margins by non-defaulting clearing members as collateral for a repo transaction) is compatible with EMIR insofar as it does not represent the final application of such margins to extinguish the losses resulting from the default of another clearing member. This follows from Article 39(8) of EMIR which provides that a CCP shall have a right of use relating to margins or default fund contributions collected via a security financial collateral arrangement and Article 44(3) of Commission Delegated Regulation (EU) No 153/2013 which provides that a CCP may re-use financial instruments posted as margins, default fund contributions or contributions to other financial resources where the purpose of the re-use is for managing the default of a clearing member (among other possible uses and subject to other specified limitations). When extinguishing losses resulting from the default of a clearing member a CCP must follow the default waterfall prescribed in Article 45 of EMIR (and elaborated in Chapter IX of Commission Delegated Regulation (EU) No 153/2013. Therefore, if the total pool of assets held by the CCP is not reduced then transforming margins from one form to a more liquid form is compatible with EMIR.

CCP Question 19 [last update 11 February 2014]

Article 1 of EMIR – Application of the exemptions to Title IV of EMIR

Do the obligations on CCPs and their clearing members under Title IV of EMIR apply in respect of clearing members which are exempt entities under Articles 1(4) and (5) of EMIR?

CCP Answer 19

The exemption in Articles 1(4) and (5) of EMIR do not extend beyond the requirements which would otherwise be directly applicable to exempt entities, i.e. clearing, risk mitigation and reporting obligations under (4), and clearing and risk mitigation obligations under (5). In particular, the exemption does not extend to indirect requirements which are placed on exempt entities, or to requirements which apply directly to third party entities, for example the exemption does not suspend the risk management obligations imposed on CCPs under Title IV of EMIR where the CCP admits exempt entities as clearing members.

CCP Question 20 [last update 21 May 2014]

Article 28 of EMIR – Risk Committee

Pursuant to Article 28(1) of EMIR, a CCP shall establish a risk committee, which shall be composed of representatives of its clearing members, independent members of the board, and representatives of its clients. Employees of the CCP, external independent experts and employees of competent authorities may attend in a non-voting capacity. None of the groups of representatives shall have a majority in the risk committee.

a) *Is it possible for representatives of other interests (for example trading venues served by the CCP) to be members of the risk committee?*

b) *How broadly must an individual represent the interests of the CCP's clients in order to qualify as a representative of such clients on the risk committee?*

CCP Answer 20

a) The membership of the risk committee is prescribed in EMIR. An individual cannot be a member of the risk committee where they are neither a representative of the CCP's clearing members, an independent member of the board, or a representative of the CCP's clients. Such an individual might, however, be invited to attend risk committee meetings in a non-voting capacity.

b) It is recalled in Recital 61 of EMIR that clients need to be adequately represented on the risk committee as decisions taken by the CCP may have an impact on them. A CCP therefore needs to ensure that the individuals appointed to the risk committee to represent the CCP's clients are sufficiently representative of the interests of the clients of the CCP. For example, the CCP should have balanced client representation on its risk committee in respect of the activities or services for which the CCP is authorised to provide or perform. Furthermore, the CCP should satisfy itself that the individuals appointed to the risk committee are not conflicted by other interests. For example, a CCP would need to take particular care where an individual appointed to the risk committee to represent the CCP's clients is from an entity which is in the same group as a clearing member of the CCP.

CCP Question 21 [last update 21 May 2014]

Guideline and Recommendation 3(b)(v) – Prudential Requirements

Pursuant to Guideline and Recommendation 3(b)(v) of the ESMA Guidelines and Recommendations for establishing consistent, efficient and effective assessments of interoperability arrangements, interoperable CCPs are not allowed to contribute to each other's default funds or other financial resources (as such are defined in Article 43 of EMIR). However, Guideline and Recommendation 3(b)(iii) provides that CCPs should assess, collect or have access to, the required inter-CCP resources necessary to cover credit and liquidity risk arising from the interoperable arrangement, including in extreme but plausible market conditions.

How should a CCP meet Guideline and Recommendation 3(b)(iii) in the absence of requiring the interoperable CCPs to contribute to its default fund or other financial resources given that a CCP's default fund and other financial resources (as opposed to the margins it collects) are the means through which the CCP ensures that its financial resources are sufficient to cover extreme but plausible market conditions?

CCP Answer 21

On the basis that interoperable CCPs are not allowed to contribute to each other's default funds or other financial resources, it is not necessary that a CCP will include its credit exposures to the interoperable CCPs when sizing the default fund and other financial resources (i.e. the default fund of a CCP and the other financial resources are not required to enable the CCP to withstand the default of the interoperable CCPs under extreme but plausible market conditions where the CCP's exposures to those interoperable CCPs are greater than the CCP's exposures to the two clearing members to which it has the largest exposures in under extreme but plausible market conditions).

However, where the CCP does not include its credit exposures to the interoperable CCPs when sizing the default fund and other financial resources then it will need to have other arrangements (such as additional margin) in place in order to meet Guideline and Recommendation 3(b)(i) which requires that financial risks, including custody risks, arising from the interoperability arrangement are identified, monitored, assessed and mitigated with the same rigour as the CCP's exposures arising from its clearing members.

CCP Question 22 [last update 2 October 2017]

Article 46 of EMIR and Article 37 of the RTS on CCP requirements – Ongoing monitoring of collateral requirements

Article 46 of Regulation (EU) No 648/2012 requires CCPs to accept highly liquid collateral with minimal credit and market risk to cover its initial and ongoing exposure to its clearing members. Article 37 of Commission Delegated Regulation (EU) 153/2013 requires CCPs to monitor on a regular basis the adequacy of their collateral policies and procedures, as new market developments may require changes.

a) *What types of market developments should CCPs monitor?*

b) *How can CCPs ensure the monitoring of these market developments is efficient?*

CCP Answer 22

a) With respect to the adequacy of collateral policies and procedures, CCPs should monitor on an on-going basis liquidity, credit risk, and market risk. In order to perform this monitoring, CCPs should have at their disposal at least the following tools:

   i. tools to monitor liquidity, such as traded volumes, depth of the order book, bid-offers and central bank liquidity classes;

   ii. tools to monitor credit risk, such as the credit monitoring of issuers, credit spreads and ratings; and

   iii. tools to monitor market risk, such as price changes, back-tests of the collateral haircuts and implied or realised volatilities.

b) To ensure that the on-going monitoring of market developments is efficient, CCPs should ensure that:

   i. they have developed indicators for liquidity, credit risk, and market risk;

   ii. the coverage of the indicators is satisfying (e.g. it covers all securities including the least frequently traded, all trade sources, etc.);

   iii. the frequency of the review and the timeliness of the information raised by these indicators is adequate;

   iv. they have put in place operational processes and a governance process surrounding any review of acceptable collateral resulting from these indicators; and

   v. any change of the above is reported to their national competent authority (NCA).

However, this does not mean that CCPs need to have all the possible indicators for each asset class. Instead, this means that the CCPs can demonstrate that the set of indicators in place covers liquidity, credit risk, and market risk.

CCP Question 23 – Access model [Last update 7 January 2020]

(a) *When setting up models to access its clearing services (e.g. sponsored models, direct clearing models), whatever the purpose of such an access (e.g. to facilitate buy-side or small participant access to CCPs, to allow for better capital treatment, or for other purposes)*

1. *can a CCP introduce a new category of entities which would have a direct contractual link with the CCP, mixing some of the clearing member and some of the client features;*

2. *who bears the responsibility to comply with the financial obligations vis-à-vis the CCP?*

(b) *Can a CCP set up a clearing model where a client ("the Client") has the possibility to pay to the CCP the financial obligations corresponding to its positions in lieu of the clearing member?*

(c) *Can a CCP accept an individual as a clearing member?*

CCP Answer 23:

(a)(1) CCPs can establish clearing models for different categories of clearing members, clients and indirect clients, based on non-discriminatory, transparent and objective criteria, whatever the purpose of such models (e.g. to facilitate buy-side or small participant access to CCPs, to allow for better capital treatment, or for other purposes).

EMIR envisages clearing through 3 possibilities of access: via being a clearing member, via being a client or via clearing through indirect clearing arrangements. Those categories are distinct and EMIR does not contemplate mixing the status and features of a clearing member and a(n) (indirect) client.

As per Article 2 of EMIR, a clearing member is the undertaking which participates in the CCP, whereas a client does not participate in the CCP and thus is the undertaking which has a contractual relation with a clearing member (and indirect clients with a client) to be able to clear its transactions with a CCP.

(a)(2) EMIR requires that each clearing member bears the full responsibility to discharge with all the financial obligations vis-à-vis the CCP due to its participation, which include margin payment and default fund contributions. This does not mean that a third party cannot fulfil an obligation of a clearing member, but this should not transform the clearing member's liability vis-à-vis the CCP.

(b) In practice, the Client can directly pay to (and receive from) the CCP amounts corresponding to its positions instead of the clearing member. However, the CCP rules should be consistent with the following:

- the rules of the CCP foresee a possibility to refuse that the Client fulfils the payment obligations in lieu of its clearing member and the corresponding conditions for such a refusal;

- the clearing member remains responsible vis-à-vis the CCP for the discharge of the financial obligations stemming from its membership as referred to in Article 2(14) of EMIR, including any new financial obligations (e.g. fee payment, increase in default fund contribution) or an increase of the current obligations (e.g. because of market moves) due to its clearing membership, whether or not related to mutualised resources and including in relation to its clients positions;

- the payment by the Client does not entail that the Client becomes automatically a clearing member (unless it fulfils all participation requirements and has undertaken the corresponding procedure) or substitutes the clearing member;

- the CCP keeps the positions and assets of the Client segregated from the positions and assets of other clients as per Article 39(3) at a CCP and each obligation relating to individual client segregation under Article 39 of EMIR and Article 48 of EMIR remains applicable;

- given that according to Article 39(7) of EMIR, a CCP has to describe the main legal implication of each entity status and the corresponding segregation including the insolvency law applicable, the CCP may also need to perform this obligation in respect of client's insolvency law where a client performs some payments directly to the CCP;

- where the clearing member has defaulted, the CCP may, at any time after the porting window foreseen in Article 48 of EMIR with respect to the Client's assets and positions, decide to liquidate any of the clearing members house or client positions (including those of the Client) or execute any action foreseen in its rules in case of default for example because it assesses that prompt action is required to contain losses and liquidity pressures arising from the default."

(c) EMIR does not prevent in Article 2 and more specifically in the definition of a clearing member an individual from becoming a clearing member. However, should an individual apply to become a clearing member, it will need to prove to the CCP, among other requirements, that, like any other clearing member:

- it fulfils the capital requirements applicable to clearing members;

- its financial accounts are audited;

- it has the operational capacity, in terms of staff, systems and processes to meet its obligations towards the CCP, including with respect to risk management;

- it is connected to the system managed by the CCP and, directly or indirectly, to the relevant payment and settlement systems; and

- it has sufficient banking and contingency arrangements in place.

A CCP's participation requirements and risk-management controls should take into account any additional risks that may arise from having individuals as participants.

Part III: Trade repositories

Last update: 24 September 2020

All Q&As are aligned to the new technical standards on reporting applicable from 1 Nov 2017

TR Question 1 [last update 24 September 2020]

Article 9 of EMIR –Classification of financial instruments

How should the following financial instruments be classified for reporting and other purposes under EMIR?

(a) ETD on government bonds (e.g. Bund, Bobl)

(b) Cross-currency swaps, swaptions, Caps and Floors?

(c) Total Return Swaps

TR Answer 1

(a) These financial instruments should be classified as interest rates and Field 4 of Table 2 should be populated accordingly. The dedicated fields for this asset class should not be filled, since they are not relevant.

(b) These financial instruments should be classified as interest rates, in line with current market practice.

On the sections to be reported, ESMA finds that where both sections are relevant having in mind the terms of the contract being reported, both sections of reporting fields are to be reported i.e. "option" and "interest rate" for swaption, Caps and Floors, and "FX" and "interest rate" for cross-currency swaps. The contract type (Field 1 of Table 2) should be populated with the value "ST" for swaption.

There are two fields for the notional amount currency and one for the notional amount. To avoid that one counterparty reports the notional amount in CCY1 (Field 9 of Table 2) while the other would report in CCY2 (Field 10 of Table 2), which would create a reconciliation problem, the Field "Notional Amount" (Field 20 of Table 2) should be denominated in the currency reported in "Notional currency 1" (Field 9 of Table 2).

(c) Total Return Swaps should be classified based on the underlying. For example, a Total Return Swap on an equity index should be reported with value “EQ” in field Asset class (Table 2 field 2), whereas a Total Return Swap on a bond or loan should be reported with value “CR” in field Asset class (Table 2 field 2).

TR Question 2 [last update 20 March 2013]

Article 56 of EMIR - TR registration

- *May a CCP apply for registration with ESMA as a trade repository?*
- *May a CSD apply for registration as a TR?*
- *Must a TR be a separate legal entity than a CCP, CSD or exchange/regulated market?*

TR Answer 2

With reference to CCPs, Article 14 of EMIR specifies that authorisation for CCPs can be given only for activity linked to clearing. In addition Article 4 of the Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP requirements) specifies that “if a CCP provides services linked to clearing that present a distinct risk profile from its functions and potentially pose significant additional risks to it, the CCP shall manage those additional risks adequately. This may include separating legally the additional services that the CCP provides from its core functions”. On the basis of these provisions, it can be excluded that a CCP can perform any other regulated activity under the same legal entity, as it would not be considered linked to clearing. This would exclude the possibility for CCPs to apply for registration as a trade repository.

With reference to other regulated activities, EMIR and the technical standards have no specific provisions limiting the activity of a TR only to TR related activities. In addition EMIR explicitly authorise TR to perform ancillary services (Article 78(5) of EMIR)[14] and requires these services to be operationally separate.

However, given that EMIR does not restrict the provision of TR activities to legally separate entities, entities authorised to provide other regulated activities cannot be prevented from applying for registration as a TR unless they are prevented from doing this by other sectoral legislation. In these cases, similarly to the cases of ancillary activities, the regulated activities performed by the TR should be operationally separated from the TR activity.

[14] Where a trade repository offers ancillary services such as trade confirmation, trade matching, credit event servicing, portfolio reconciliation or portfolio compression services, the trade repository shall maintain those ancillary services operationally separate from the trade repository’s function of centrally collecting and maintaining records of derivatives.

TR Question 3a. [Last update 14 December 2017]

Article 9 of EMIR – Reporting of collateral

(a) How should information on collateral be reported to TRs?

(a1) Is there a need to specify the type of collateral?

(a2) Should a collateral portfolio with multiple currency values be normalised to base currency or reported in multiple currency values?

(a3) How should non-cash collateral be reported?

(a4) How should counterparties report the collateral amount where the collateral agreement allows the covering of exposures in transactions that are not to be reported under EMIR?

(a5) When should collateral be reported for types of collateral (such as securities) where settlement of the movement could take place after the collateral movement was initiated?

(b) Shall change in the amount of collateral be reported as modification (M) or as valuation update (V) in Table 2 field No. 58?

(c) In the case where the Counterparty 2 returns part of the variation margin initially posted by the Counterparty 1, shall this margin be reported by Counterparty 1 as a reduction of the margin initially posted or shall be reported as margin received?

(d) How counterparty should report the VM amount that is not transferred, because it is below the agreed Minimum Transfer Amount (MTA)? Should it be reported as excess collateral?

TR Answer 3a

(a) As specified in Article 3 of Commission Delegated Regulation (EU) No 2017/148, collateral can be reported on a portfolio basis. This means the reporting of each single executed transaction should not include all the fields related to collateral, to the extent that each single transaction is assigned to a specific portfolio and the relevant information on the portfolio is reported on a daily basis (end of day).

The collateral should be reported at the total market value that has been posted by the Counterparty responsible for the report. Therefore any haircuts or similar used by the receiver of the collateral and any fees or similar amounts should all be ignored.

(a1) The reporting of collateral information is first split into (i) collateral posted and (ii) collateral received and secondly into (i) initial margin, (ii) variation margin and (iii) excess collateral. Therefore the relevant field should correspond to the type and currency of collateral posted or received (Table 1 Fields 24 to 35).

(a2) There is only one collateral currency field associated with a collateral type on a report by a Counterparty. Therefore all collateral for a single portfolio collateral type should be reported in one single currency value for the corresponding collateral type. The reporting counterparty is free to decide which currency should be used as base currency as long as the base currency chosen is one of the major currencies which represents the greatest weight in the pool and is used consistently for the purpose of collateral reporting for a given portfolio.

(a3) Non-cash collateral should be reported as its current cash equivalent as evaluated at the moment of posting/receiving the collateral.

(a4) The collateral reported should be just the collateral that covers the exposure related to the reports made under EMIR. If it is impossible to distinguish within a pool of collateral the amount which relates to derivatives reportable under EMIR from the amount which relates to other transactions the collateral reported can be the actual collateral posted covering a wider set of transactions.

(a5) The collateral should be reported as the total market value that has been posted or received by the counterparty responsible for the report. The fact that certain types of collateral might take a couple of days to reach the other counterparty should be ignored.

(b) Valuation update (V) in Field 93 of Table 2 refers to any change in fields 17 to 35 of Table 1. Therefore, changes in the amount of collateral should be reported as a (V) in Field 93 of Table 2.

(c) Counterparty 1 should report in this case decreased variation margin posted, rather than separate variation margin received.

(d) Excess collateral should capture only additional collateral that is posted or received separately and independently from the initial and variation margin. Therefore, any collateral posted or received under the concept of variation margin, should be reported as such, rather than as excess collateral. If the variation margin amount does not exceed the MTA and therefore it is not posted, it should not be reported as VM posted.

Please refer to the below example for further clarifications on points c) and d).

			1.24	1.26	1.28	1.30	1.32	1.34	1.94
CP 1	CP 2	Date	IM posted	VM posted	IM received	VM received	Excess collateral posted	Excess collateral received	Level
A	B	Day 1				10,000,000			P
B	A	Day 1		10,000,000					P
A	B	Day 2				10,000,000			P
B	A	Day 2		10,000,000					P
A	B	Day 3				8,000,000			P
B	A	Day 3		8,000,000					P
A	B	Day 4				13,000,000			P
B	A	Day 4		13,000,000					P
A	B	Day 5		7,000,000					P
B	A	Day 5				7,000,000			P
A	B	Day 6		2,000,000					P
B	A	Day 6				2,000,000			P
A	B	Day 7							P
B	A	Day 7							P

Day 1: Due to valuation of the contract[15] B has to provide 10 million as VM to A.

Day 2: The valuation of the contract drops so that the VM requirement of A is reduced to 9.8 million. However, the MTA is set at 500,000.

Day 3: The valuation of the contract drops further and A needs to return additionally 1.8 million VM back to B. The total amount of VM returned by A is 2 million (0.2 million + 1.8 million).

Day 4: The valuation of the contract rises and A receives 5 million VM from B.

Day 5: The valuation of the contract drops again and turns negative for A. Therefore A has to provide 20 million VM to B.

Day 6: A partially sells the contract and receives 5 million VM back from B.

Day 7: A and B close out the contract and therefore exchange all outstanding margin.

TR Question 3b [Last update 21 September 2021]

Article 9 of EMIR – Reporting of valuations

(a) *How should information on valuation be reported to TRs?*

- (a1) *Should the variation margin be taken into account for the calculation of the mark to market value?*
- (a2) *Which price should be considered for the purpose of calculating the mark-to-market value of contract to be reported in Table 1, Field 17?*
- (a3) *How should the mark to market value be calculated?*

(b) *When a transaction is first reported can the mark-to-market valuation be left empty and reported later after end of day with a modification?*

(c) *On what basis a specific valuation should be considered as mark-to-market as opposed to mark-to-model?*

(d) *Where reporting has been delegated to a counterparty, e.g. from A to B, is it acceptable for B's valuation to be submitted in the A's report?*

(e) *In the case of OTC derivatives not cleared by a CCP, do counterparties have to agree on the valuation reported?*

[15] This example refers to reporting of collateral for a specific contract, but it equally applies to the reporting at the collateral portfolio level.

(f) *Should counterparties send valuation update on the last day of a derivative and for intraday derivatives? (i.e. derivatives that are concluded and terminated on the same day)?*

TR Answer 3b:

(a) With reference to transactions cleared by a CCP, the fields on the contract valuation should be reported on a daily basis, as maintained and valued by the CCP in accordance with Article 3 (5) of Commission Delegated Regulation (EU) No 148/2013 (RTS on reporting to TR). This does not mean that the report should be made by the CCP. The CCP may make data available to counterparties so that the latter report. The use of CCP valuation data does not mean duplication of reporting. Those reports can instead be done for position level when such information is provided.

To the extent that counterparties of reported transactions are subject to the requirement to daily mark-to-market/mark-to-model them, changes in mark-to-market or mark-to-model valuations on already reported transactions need to be reported on a daily basis (end of day). For contracts not cleared by a CCP the counterparties should report valuations performed in accordance with the methodology defined in International Financial Reporting Standard 13 Fair Value Measurement as adopted by the Union and referred to in the Annex to Commission Regulation (EC) No 1126/2008.

(a1) No. It is not permissible to report zero in the field 17 of Table 1 exclusively on the grounds that there is no market risk because variation margin has been paid or received. Any margin paid or received would be reflected in the fields 26 and 30 of Table 1 and not in this field.

(a2) The mark to market value (Table 1, Field 17) should be based on the End of Day settlement price of the market (or CCP) from which the prices are taken as reference. If an End of Day settlement price is not available, then the mark to market value should be based on the closing mid-price of the market concerned. Counterparties should use a mark-to-market or mark-to-model price as referred to in Article 11(2) of EMIR. For transactions cleared by a CCP, counterparties should use the CCP's valuation in accordance with Article 3 (5) of Commission Delegated Regulation (EU) No 148/2013.

(a3) The mark to market value should represent the total value of the contract, rather than a daily change in the valuation of the contract.

(b) By the end of the day following execution (reporting time limit) the contract and all its characteristics, including valuation, should be reported. Please refer to the table at the end of this Q&A for a more detailed example of reporting of the valuations.

(c) Whenever a price is available for the valuation, such valuation should be considered as 'mark-to-market'.

(d) When counterparties delegate reporting, including valuations, they retain responsibility for ensuring that reports submitted on their behalf are accurate and for periodically ensuring that they are in agreement with the values submitted on their behalf.

(e) Since the valuation is part of the Counterparty data, in the case of a derivative not cleared by a CCP, counterparties do not need to agree on the valuation reported. However, in accordance with Art. 1(2) of the Commission Delegated Regulation (EU) No 148/2013 (RTS on reporting to TR) the counterparties should report valuations performed in accordance with the methodology defined in International Financial Reporting Standard 13 Fair Value Measurement as adopted by the Union and referred to in the Annex to Commission Regulation (EC) No 1126/2008.

(f) No, it is not required to send valuation and collateral data in those cases.

Example of reporting of valuation and collateral

	CP 1	CP 2	UTI	Quantity	B/S Indicator	Execution	Reporting	Value of contract	Valuation timestamp	IM post	VM post	Level	AT
1	IF	CCP	1234	10,000	B	25.08.2015/ 14:27:25	26.08.2015/ 10:08:35					Trade	P
2	IF	CCP	ABCD	10,000	B	25.08.2015/ 18:04:58	26.08.2015/ 10:09:00					Position	N
3	IF	CCP	ABCD	10,000	~~B~~	25.08.2015/ 18:04:58	26.08.2015/ 18:05:50	11,758.00	25.08.2015/ 18:10:05	1,000	0	Position	V
4	IF	CCP	ABCD	10,000	~~B~~	25.08.2015/ 18:04:58	27.08.2015/ 18:10:00	11,555.98	26.08.2015/ 18:08:10	1,000	200	Position	V
5	IF	CCP	789	5,000	B	27.08.2015/ 09:45:00	28.08.2015/ 10:05:00					Trade	P
6	IF	CCP	ABCD	15,000	B	25.08.2015/ 18:04:58	28.08.2015/ 18:10:09					Position	M
7	IF	CCP	ABCD	15,000		25.08.2015/18:04:58	28.08.2015/ 17:03:46	17,439.60	27.08.2015/ 17:05:39	1,500	200	Position	V
8	IF	CCP	5678	7,000	B	28.08.2015/ 10:29:40	29.08.2015 /10:07:05					Trade	P
9	IF	CCP	ABCD	22,000	B	25.08.2015/ 18:04:58	29.08.2015/ 10:04:50					Position	M
10	IF	CCP	ABCD	22,000		25.08.2015/ 18:04:58	29.08.2015/ 10:07:05	23,005.93	28.08.2015/ 17:38:34	2,200	1000	Position	V
11	IF	CCP	XXYYZZ	22,000	S	29.08.2015/ 15:43:36	30.08.2015/ 10:07:36					Trade	P
12	IF	CCP	ABCD	0	S	25.08.2015/ 18:04:58	30.08.2015/ 10:07:38					Position	M
13	IF	CCP	ABCD	0		25.08.2015/ 18:04:58	30.08.2015/ 16:00:09	0.00	29.08.2015/ 17:58:11	0	0	Position	V
14	IF	CCP	ABCD	0		25.08.2015/ 18:04:58	31.08.2015/ 17:11:23	0.00	30.08.2015/ 18:08:14	0	0	Position	V
15	IF	CCP	ABCD	0		25.08.2015/ 18:04:58	01.09.2015/ 16:59:34	0.00	31.08.2015/ 17:44:43	0	0	Position	V
16	IF	CCP	AE3100	300	B	01.09.2015/ 11:12:00	02.09.2015/ 08:59:34					Trade	P
17	IF	CCP	ABCD	300	B	25.08.2015/ 18:04:58	02.09.2015/ 09:00:03					Position	M
18	IF	CCP	ABCD	300		25.08.2015/ 18:04:58	02.09.2015/ 17:46:44	321.01	01.09.2015/ 17:25:38	50	0	Position	V

Explanation of the reporting scenario:

1. Line 1: On 25.08.2015/ 14:27:25 Counterparty 1 (IF) concludes a trade 1234 with the Counterparty 2 (CCP) and is included in the position on the same day. The trade is reported by the Counterparty 1 on 26.08.2015/ 10:08:35 with Action type "Position component" ("P"). It should be noted that the counterparty could equally report the execution and compression of the trade 1234 with two separate reports using the Action types "New" ("N") and "Compression" ("Z").

2. Line 2: The new position ABCD resulting from compression is created end-of-day on 25.08.2015 and reported on the following day with Action type "New" ("N").

3. Line 3: The newly created position is valued on the same day as it was concluded (25.08.2015/ 18:10:05). The valuation report is submitted on the following day (26.08.2015/ 18:05:00). The valuation report contains also the information on the collateral posted to the CCP as IM and VM (1000 and 0, respectively). It should be noted that for the purpose of this example it is assumed that the collateral is posted at the position level, however it is acknowledged that collateralisation at the portfolio level might be the prevailing industry practice.

4. Line 4: The position is not modified on 26.08.2015. Therefore, the counterparty sends only the Valuation report on the following day reporting the change in the Value of the contract and the additional VM of 200.

5. Line 5: Counterparty 1 concludes a new trade 789 with the Counterparty 2 with quantity 5000. The trade in compressed into the existing position ABCD on the same day. Hence, the trade is reported by the Counterparty 1 on the following day with Action type "Position component" ("P").

6. Line 6: Upon compression, trade 789 is included into the position ABCD. This is reported on the following day as modification of the position by increase in the quantity from 10 000 to 15 000.

7. Line 7: Valuation of the position and modified margins' values (IM=1500 and VM= 200) are reported on 28.08.2015.

8. Line 8: Another trade between the counterparties with quantity 7.000 takes place on 28.08.2015 and is compressed into the existing position. Counterparty reports the conclusion and compression of the trade using the Action type "Position component".

9. Line 9: The position is modified by increase in the quantity from 15 000 to 22 000 28.08.2015. The modification is reported on the following day.

10. Line 10: Valuation of the position and modified margins' values (IM= 2200 and VM= 1000) are reported on 29.08.2015.

11. Line 11: On 29.08.2015 the total of 22.000 quantity is sold. The new transaction is also netted into the position on the same day. Accordingly, the counterparty reports the transaction with Action type "Position component" ("P) and indicating it is a "Sell".

12. Line 12: As result of the "Sell" transaction the position is modified to the quantity of zero. It should be noted that if the counterparty would decide to terminate the position, it would need to send the report with Action Type "Early Termination" ("C"). In such case the entity would not be expected to send the valuation reports (as described in lines 13-15). Furthermore, as the counterparty was the seller in the derivative concluded at trade level that resulted in the netting of the position, the counterparty should report "S" in B/S indicator field in the report modifying the notional of the position to zero. The other counterparty, in the same scenario, should report "B" in B/S indicator field, as it was the buyer in the derivative concluded at trade level that resulted in the netting of the position.

13. Line 13: Accordingly, the valuation and collateral amounts are reset to zero.

14. Lines 14-15: No new trades are concluded on 30-31.09.2015. Given that the position has not been terminated, Counterparty submits only the Valuation reports, with valuation and collateral amounts equal to zero.

15. Line 16: On 01.09.2015 a new trade with quantity 300 takes place between the same counterparties and is compressed into the previous position.

16. Line 17: Therefore, the position is amended by reporting the new quantity of 300.

17. Line 18: Subsequently, Valuation report is sent including the information on the value of the position and new margins posted (IM= 50 and VM=0).

TR Question 4 [last update 15 July 2019]

Reporting of outstanding positions following the entry into force of EMIR (Backloading)

The regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 removed the backloading requirement from Article 9 of EMIR. Consequently, this Q&A was no longer relevant and was deleted.

TR Answer 4

Deleted

TR Question 5

Article 9 of EMIR – Reporting to TRs

(a) *Will the reporting obligation apply to all ETD transactions concluded on the regulated market?*

(b) *Are lifecycle events (also intraday) registered for ETDs?*

TR Answer 5

(a) The EMIR reporting obligations covers all derivatives.

As noted in EMIR Article 2(5), ''derivative' or 'derivative contract' means a financial instrument as set out in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC as implemented by Article 38 and 39 of Regulation (EC) No 1287/2006'.

Questions related to MiFID definitions for product scope are addressed under the Commission's MiFID Q&A database:

http://ec.europa.eu/yqol/index.cfm?fuseaction=legislation.showGroup&groupCode=MiFID

(b) Lifecycle events are covered and a log is foreseen in Article 4 of Commission Delegate Regulation (EU) No 148/2013. This will be useful to ensure tracing of trades and comprehensive data records while keeping most data fields clear in the main records of the TR. All information should be reported at the end of the day in the state that it is in at that point. Intraday reporting is not mandatory.

TR Question 6 [Last update: 29 May 2018]

Article 9 of EMIR – Reporting to TRs: Cleared trades

The approach to the reporting of cleared trades was clarified in Article 2 of the Commission Delegated Regulation (EU) No 148/2013. Consequently, this Q&A was no longer relevant and was deleted.

TR Answer 6

Deleted

TR Question 7 [last update 15 July 2019]

Article 9 of EMIR – Reporting to TRs: Avoidance of duplication

(a) *In order to avoid the duplication of reported details (according to Article 9(1e) of EMIR), could the CCP impose on its clearing members (and, consequently, on counterparties represented by the clearing members in clearing) that transactions accepted by the CCP for clearing are reported only by the CCP to the TR selected by the CCP?*

(b) *Does reporting without duplication mean that only one of the counterparties may report or must both counterparties report the trade from their point of view?*

TR Answer 7

(a) Article 9 provides that counterparties and CCPs should ensure reporting, not only CCPs. Counterparties and CCPs should ensure that there is no duplication of the reporting details by way of agreeing on the most efficient reporting method, to avoid duplication. In the scenario where the CCP and counterparties use different TRs, it is possible that the CCP reports that the contract has been cleared in a TR different from the TR in which the contract has been originally reported by the counterparties. CCPs and counterparties should then do so with consistent data, including the same trade ID and the same valuation information to be provided by the CCP to the counterparties.

Under Article 9 of EMIR, both the counterparties and the CCP have an obligation to ensure that the report is made without duplication, but neither the CCP nor the counterparties have the right to impose on the other party a particular reporting mechanism. However, when offering a reporting service, the CCP can choose the TR to be used and leave the choice to the counterparty on whether to accept or not the service for its trade to be reported by the CCP on its behalf.

(b) The requirement to report without duplication means that each counterparty should ensure that there is only one report (excluding any subsequent modifications) produced by them (or on their behalf) for each trade that they carry out. Their counterparty may also be obliged to produce a report and this also does not count as duplication. Where two counterparties submit separate reports of the same trade, they should ensure that the common data are consistent across both reports.

TR Question 8

Article 9 of EMIR – Reporting to TRs: delegation

(a) *Are there general provisions in place how the outsourcing has to be organized in case a third party is used for reporting? Might there be different criteria for that outsourcing, depending on the home member state of the outsourcing entity?*

(b) *Is it possible to delegate the generation of the UTI?*

TR Answer 8

(a) There are no specific rules on how this should be performed although legal documentation is recommended (e.g. written agreement between party responsible for reporting and the report submitting entity, even if also under the duty to report, such as the other counterparty or the CCP). EMIR provisions should be respected (timely and accurate reporting, etc.) and the counterparties shall remain liable for any misreporting by third entities they rely upon.

(b) Yes.

TR Question 9 [last update 23 March 2023]

Article 9 of EMIR ITS (Table of Fields) – Reporting to TRs

(a) What is the difference in the two fields: Trade ID and Report Tracking Number?

(b) If a counterparty is itself the beneficiary to a trade should it be reported in both the "counterparty" and "beneficiary" fields?

(c) If a counterparty is itself the Clearing Member (CM) to a trade, should it be reported in both the "counterparty" and "CM" fields?

(d) If a CM is itself the broker to a trade, should it be reported in both the "CM" and "broker" fields?

(e) If a broker is itself the counterparty (legal principal) to a trade, should it be reported in both the "broker" and "counterparty" fields?

TR Answer 9

(a) There is no common EMIR and MiFID ID for derivatives yet. The Trade ID is the key one for EMIR reporting (per contract). The Report Tracking Number is a unique code assigned to the execution and common among a group of reports related to the same execution. In the particular case of reporting the ETD contracts please see Answer 5 in Part V: ETDs Reporting.

(b) to (d): Yes.

modified (e) No, when a broker is a counterparty to a derivative, it should report the derivative and identify itself as a counterparty. In line with the RTS on reporting and more particularly with regard to the details to be reported in the field 1.8, the broker is then not required to report its LEI in the field 'Broker ID'.

TR Question 10 – Codes

LEI (Legal Entity Identifier)

(a) Can a client code be used (e.g. account no. or member id) for customers who do not have LEI?

(b) *What code should be used to identify counterparties?*

(c) *Will the LEI cover branches or desks?*

(d) *If a counterparty is established in a third country whose legal framework prevents the disclosure of its identity by the European counterparty subject to the reporting obligation, how should the European counterparty fill the counterparty field?*

UPI (Unique Product Identifier) and UTI (Unique Trade Identifier)

(e) *What codes should be used / is there any development in the UPI and UTI?*

TR Answer 10

(a) Yes, where customers are individuals not acting in business capacity. For customers other than individuals see (b) on the ID of counterparties below.

(b) An LEI issued by, and duly renewed and maintained according to the terms of, any of the endorsed LOUs (Local Operating Units) of the Global Legal Entity Identifier System. The list of endorsed LOUs is available at: https://www.gleif.org/en/lei-focus/how-to-get-an-lei-find-lei-issuing-organizations .

It should be noted that legal entities and also individuals acting in an independent business capacity are eligible to obtain LEIs (see http://www.leiroc.org/publications/gls/lou_20150930-1.pdf).

(c) Following the Recommendation 10 of the FSB Report on a Global Legal Entity Identifier for Financial Markets (http://www.financialstabilityboard.org/publications/r_120608.pdf), at its first phase LEI did not cover branches/desks and the same legal entity would only have one LEI: "a particular issue for early review is for the ROC to consider whether and if so how the global LEI can be leveraged to identify bodies such as branches of international banks which are not legal entities, but which require separate identification under some cross-border resolution schemes".

The LEI ROC has undertaken such review and issued a following statement on international branches: https://www.leiroc.org/publications/gls/roc_20160711-1.pdf.

It should be noted however that the counterparties reporting under EMIR should always identify themselves with the LEI of the headquarters, given that the legal responsibility for reporting always lies on the headquarter entity and not on the branch.

(d) Article 9(5) EMIR provides that at least the identities of the parties to the derivative contracts should be reported to trade repositories. This requirement cannot be waived. Therefore, a European counterparty dealing with counterparties that cannot be identified because of legal, regulatory or contractual impediments, would not be deemed compliant with Article 9(5) of EMIR.

(e) ESMA did not yet receive any formal request to endorse a UPI or UTI framework and there are no details yet on how these will look like. If there is no endorsed UPI/UTI the counterparty should report other codes, as set out in the EMIR technical standards on reporting.

TR Question 11 [last update 8 July 2020]

Article 9 - Frequency of reports

(a) If a counterparty does not enter into any new derivative transaction during several days, is it required to report the already concluded transactions every day to the TR?

(b) How should a "working day" be defined for the purpose of determining the deadline for reporting? How, the counterparties should proceed if they follow different calendars or are located in different timezones?

(c) Should transactions executed during the same day that are netted or terminated for other reasons, be reported to TRs?

TR Answer 11

(a) Where no contracts are concluded, modified or terminated no reports are expected apart from updates to valuations or collateral as required. As the obligation to report shall be complied with at T+1 (T being the date of conclusion/modification/termination of the contract), there is no other need to send daily reports if there are no conclusion, modifications to the contract or termination.

(b) Counterparties should follow their local time to determine the day on which the derivative was concluded, modified or terminated. The deadline for reporting is the working day following that day. The determination of the deadline for reporting in the local time does not affect the way in which the relevant dates and times (such as execution timestamp) are reported to the TRs. The time convention for reporting is defined in the Commission Delegated Regulation (EU) 2017/105 ~~ITS~~ as UTC (Coordinated Universal Time).

As regards the calendar, counterparties should follow the relevant calendar of their Member State to determine whether a given day is a working day or holiday.

This guidance applies also when the two counterparties to the same derivative follow different calendars and/or are located in different timezones, meaning that each counterparty should follow its own local calendar and use the local time to determine the deadline for reporting.

(c) Yes.

TR Question 12 [last update: 29 May 2018]

Maturity

a) Does a counterparty need to report as a termination the fact that a contract has matured on the agreed day or could it assume that was implied by the initial report (which would include the maturity) and that termination would only need to be reported if the contract was terminated before maturity?

b) *The RTS on the minimum details of the data to be reported to trade repositories indicates in Field 27 of Table 2 that the Maturity date field should reflect the "original date of expiry of the reported contract. An early termination shall not be reported in this field". However, in certain instances the maturity date of a derivative is subject to modifications which are already foreseen in the original contract specifications (e.g. calendar trades in commodities derivatives). Therefore, the current maturity date might be substantially different from the original maturity date as its value will reflect the updated maturity date that has been agreed in the original contract specifications. Is the maturity date field intended to reflect the updated maturity date?*

c) *In the case where the Maturity date falls on a weekend or a bank holiday, should counterparties report the original Maturity date or the adjusted one?*

TR Answer 12

a) Under Article 9 of EMIR there is a duty to report the termination. However, where termination takes place in accordance with the original terms of the contract, it can be assumed that such a termination was originally reported, provided that the TR adequately identifies this termination date. Therefore, only terminations that take place at a different date should be reported.

b) The description of Field 27 of Table 2 in the RTS on the minimum details of the data to be reported to trade repositories is aimed at ensuring that early terminations of a contract are not reported in this field. Accordingly, when an opening of a new contract occurs, the maturity date field represents the "original date of expiry of the reported contract". However, when the maturity date of an existing contract is subject to changes which are already foreseen in the original contract specifications, counterparties send a modification report to the initial entry, modifying the maturity date field accordingly to reflect the updated maturity date.

c) The counterparties should report the unadjusted Maturity date, as agreed in the contract, even if it falls on a weekend or a bank holiday.

TR Question 13 [last update 15 July 2019]

Intragroup transactions

Should intragroup transactions be reported?

TR Answer 13

Yes. The reporting obligation applies to intragroup trades. They should be reported as any other trades and the corresponding Field 38 "Intragroup" in Table 2 should be filled with the value "yes".

However, Article 9(1) EMIR, as amended by Regulation 2019/834, introduced the reporting exemption for intragroup transactions where at least one of the counterparties is a non-financial counterparty or would be qualified as a nonfinancial counterparty if it were established in the Union. See TR Question 51 for further clarifications.

TR Question 14 [last update 2 October 2019]

Transactions within the same legal entity

Should transactions within the same legal entity (e.g. between two desks or between two branches with the same LEI) be reported?

TR Answer 14

No, because they do not involve two counterparties. The only exception being the situation in which a Clearing Member defaults and the CCP temporarily assumes both sides of the outstanding transactions.

TR Question 15 [last update 5 August 2013]

Non-European subsidiaries of European entities

Does the reporting obligation apply to non-European subsidiaries of a group for which the parent undertaking is established in the European Union?

TR Answer 15

No; the reporting obligation to trade repositories applies to counterparties established in the European Union. Therefore, non-European subsidiaries are not subject to the reporting obligation. In the case of contracts between a EU counterparty and a non-EU counterparty, the EU counterparty will need to identify the non-EU counterparty in its report.

TR Question 16

Collateral portfolio code

How should the Collateral portfolio code be populated?

TR Answer 16

The Commission Delegated Regulation (EU) No 148/2013 (RTS on reporting to TR) specifies that where the collateral related to a contract is reported on a portfolio basis, the reporting counterparty shall report to the trade repository a code identifying the portfolio related to the reported contract.

It is up to the Reporting Counterparty to determine what unique value to put in the Collateral portfolio code (Table 1 Field 23). This field should only be populated if the Collateral portfolio (Table 1 Field 22) has the value 'Y'.

The Commission Implementing Regulation (EU) No 1247/2012 (ITS on reporting to TR) specifies that the Collateral Portfolio Code can have up to 52 alphanumerical characters including four special character. Therefore, a Collateral Portfolio Code that is less than 52 characters in length is permissible provided that it meets the other criteria laid out here.

It is, for example, permissible to use a value in this field that is supplied by the CCP, but this is not required and other values could be used

TR Question 17 [last update 2 October 2019]

Position level reporting

(a) *Is it possible to report post-trade events at position level in addition to the trade level?*

(b) *A position may contain trades executed at different venues or both on and off exchange. How should the venue of execution (Table 2 Field 15) be populated at position level?*

(c) *Can a position be reported as being the result of compression, i.e. "Y" in field compression (Table 2 Field 16)?*

TR Answer 17

(a) It is possible to use position level reporting as a supplement to trade level reporting provided that all of the following conditions are met.

1. The legal arrangement is such that the risk is at position level, the trade reports all relate to products that are fungible with each other and the individual trades have been replaced by the position. This could be the case, for example, between a clearing member and a CCP.

2. The original trades, i.e. at transaction level, have been correctly reported. It is not permissible to report only positions. Whenever an existing trade is to be included in a position level report in the same day, such contract is to be identified as "position component" by using the action type "P" in Table 2 Field 93. This value will be equivalent to reporting a new trade followed by an update to that report showing it as compressed. All contracts concluded on or after 12 February 2014 must be reported at the transaction level in all cases, starting 12 February 2014.

3. Other events that affect the common fields in the report of the position are separately reported.

4. The original trade reports (point 2 above) and reports relating to other events (point 3 above), where applicable, have reached a suitable "end of life state". This should be achieved by marking the original trades/event reports as compressed (i.e. putting the value 'Z' into the Action type (Table 2 Field 93) via a modification) and then reporting the resulting net position (either as a new position or as an update to an existing position)~~.~~

5. The report of the position is made correctly filling in all the applicable fields in Tables 1 and 2 and by indicating "P" in Field 94 of Table 2.

If these conditions are met, then subsequent updates, including valuation updates, collateral updates and other modifications and lifecycle events can be applied to the position (as modifications etc., and keeping the same value of the Trade ID on the position) and not to the original derivatives comprised in that portfolio.

Furthermore, ESMA would like to stress the importance of the general obligation according to which the counterparties need to agree the report's contents before submitting it to TRs. This obligation stems from the requirement of Article 9(1) of EMIR, 'counterparties and CCPs shall ensure that the details of their derivative contracts are reported without duplication' and is specified in the European Commission's Frequently Asked Questions document Section II Question 5:

http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/emir-faqs_en.pdf

Therefore, it should be noted that reporting at position level should be done consistently by both counterparties to the derivative, i.e. it is not allowed that one counterparty reports subsequent updates at trade level, while the other reports those updates at position level. Furthermore, in certain circumstances reporting at position level is the only possible option to comply with EMIR reporting obligations (hence it becomes mandatory in order to report correctly), e.g. when the counterparties are not able to value the individual position components.

(b) At position level, the Venue of execution field (2.15) should be populated with the MIC code of the venue where the highest number of derivatives that are included in the reported position were executed.

(c) No. The compression field (2.16) is to be used to identify derivative contracts which are the result of compression as defined under MIFIR *Article 2(1)(47)* and are the result of compression as required by EMIR Article 11(1). Consequently, the compression field: (i) is only intended for reporting at transaction level of OTC contracts not cleared by a CCP and (ii) should always be populated with "N" for position reporting.

TR Question 18

Article 9 of EMIR – Reporting to TRs: UTI construction

How to construct a Unique Trade ID?

TR Answer 18

Article 4 of the Commission Implementing Regulation (EU) No 1247/2012 specifies that in absence of global unique trade identifier endorsed by ESMA, a unique code should be generated and agreed with the other counterparty (Table 2, field 12). This means that only one Trade ID should be applicable to any one derivative contract that is reported to a trade repository under EMIR and that the same Trade ID is not used for any other derivative contract. It is also acknowledged that contracts reported under EMIR rules might also reported under the rules of other jurisdictions. Hence, the same Trade ID should be allowed to be used in both those jurisdictions for reporting the given contract in order to facilitate the reconciliation among all the data sets.

Commission Implementing Regulation (EU) No 148/2013 (RTS on reporting to TR) specifies that the Trade ID can have up to 52 characters, including four special characters, the special characters not being allowed at the beginning or at the end of the code. Therefore, a Trade ID that is less than 52 characters in length is permissible provided that it meets the other criteria laid out here. There is no requirement to pad out Trade ID values to make them 52 characters long.

As an illustration, ESMA considers that any of the methods provided in the following list of Trade ID construction would be deemed to meet the requirements for reporting under EMIR. ESMA reserves the initial three character sequences 'E00' to 'E99' inclusive for these purposes. The Trade ID should be formed by the concatenation (without separators) of the three elements in each case.

Method 1:

a. The characters 'E01'.

a. The MIC code (ISO 10383) of the applicable trading venue.

b. A unique code generated by that trading venue (for centrally executed but non-centrally cleared trades) or by a CCP used by that trading venue to clear the derivative contract (for centrally executed and cleared trades). If the CCP generates the code and if derivative contracts executed on that trading venue could be cleared by more than one CCP, then measures should be put in place to avoid different CCPs generating the same value.

Method 2:

a. The characters 'E02'.

b. The (20 character) Legal Entity Identifier of the generating entity (normally one of the parties to the trade and pursuant to the points (a), (c) and (e) of the hierarchy mentioned in Article 1(4) of the Commission Implementing Regulation (EU) No 1247/2012 (ITS on reporting to TR).

c. A unique code generated by the unique Trade ID generating entity.

Method 3:

a. The characters 'E03'.

b. A unique code generated independently by both counterparties based on the pre-agreed set of information about the trade in such a way that both counterparties will arrive at the same code and that it would be unique with respect to any other report. The two counterparties are responsible for providing the same code. The information used should include Common Data from Table 2 of the Commission Delegated Regulation (EU) No 148/2013 and the Legal Entity Identifiers of the two counterparties.

For derivative contracts that are also reportable under the provisions of the Dodd-Frank Act the same value as the one to be reported under the Dodd-Frank Act, i.e. the Unique Swap Identifier16, could be used.

Counterparties should agree which form of a unique Trade ID they will use before reporting the derivative contract. This therefore includes determining the approach that they will use to define which entity generates the unique Trade ID.

[16] As defined in http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/usidatastandards100112.pdf.

TR Question 19 [Last update: 29 May 2018]

Article 9 of EMIR – Reporting to TRs: UTI generation

The approach to the generation of the UTI was clarified in Article 4a of the Commission Implementing Regulation (EU) No 1247/2012. Consequently, this Q&A was no longer relevant and was deleted.

TR Answer 19

Deleted.

TR Question 20a

Article 9 of EMIR – Reporting to TRs: Empty fields

Are all fields specified in the Annex of the Commission Delegated Regulation (EU) No 148/2013 mandatory? Can some fields be left blank?

TR Answer 20a

In general, all fields specified in the RTS are mandatory. Nevertheless, two different instances need to be acknowledged, namely:

1. The field is **not relevant** for a specific type of contract/trade, for example:
   - commodity underlying field in case of equity derivatives,
   - Domicile of the Counterparty in case of coverage by LEI.

2. The field is **relevant** for a given type of contract/trade, however:
   a. there is a legitimate reason why the actual value of this field is not being provided at the time the report is being submitted, or
   b. none of the possible values provided for in the Annex of the Commission Implementing Regulation (EU) No 1247/2012 for a given field apply to the specific trade.

In order to enable the TRs distinguishing between the two instances above and allow them to comply with requirements of Article 19 of the Commission Delegated Regulation (EU) 150/2013 (in particular to verify the compliance of the reporting counterparty or submitting entity with the reporting requirements), a different approach should be envisaged when it comes to population of the not relevant and relevant fields.

In the first case, since the field is not relevant for a given trade, it should be left blank.

In the second case, the mandatory relevant field should not be left blank and should include the Not Available (NA) value instead.

TR Question 20b

Article 9 of EMIR – Reporting to TRs: TRs validations of EMIR reports

How are TRs expected to verify completeness and accuracy of the reports submitted by the reporting entities?

TR Answer 20b

TRs should apply validation rules to ensure that reporting is performed according to the EMIR regime, including the specifications of the Technical Standards. Accordingly, reporting counterparties or submitting entities should comply with the reporting requirements specified in the Validation table which can be found on ESMA's website at the following link: https://www.esma.europa.eu/sites/default/files/library/esma70-145-63_emir_validation_rules_for_revised_rts_its.xlsx

Given the Commission Delegated Regulation (EU) No 148/2013 (RTS on reporting to TR) and Commission Implementing Regulation No 1247/2012 (ITS on reporting to TR) the validation criteria have been updated. These updates apply from 1 November 2017.

In order to be compliant with the requirements of Article 19 of the Commission Delegated Regulation (EU) 150/2013, TRs should reject the reports which are not submitted in line with the reporting requirements specified in the Validations table.

TR Question 21 [Last update: 29 May 2018]

Article 9 of EMIR – Reporting to TRs: UPI taxonomy

The approach to the reporting of product taxonomy was clarified in the Annex to the Commission Delegated Regulation No 148/2013 . Consequently, this Q&A was no longer relevant and was deleted.

TR Answer 21

Deleted

TR Question 22 [Last update: 29 May 2018]

Article 9 of EMIR – Reporting to TRs: Venues with AII codes

The approach to the reporting of instruments classification was clarified in Article 4 of the Commission Implementing Regulation (EU) No 1247/2012 . Consequently, this Q&A was no longer relevant and was deleted.

TR Answer 22

Deleted.

TR Question 23 [Last update: 29 May 2018]

Article 9 of EMIR – Reporting to TRs: AII code

The approach to the reporting of AII identifier was clarified in Article 4 of the Commission Implementing Regulation (EU) No 1247/2012. Consequently, this Q&A was no longer relevant and was deleted.

TR Answer 23

Deleted

TR Question 24 [last update 14 December 2017]

Article 9 of EMIR – Reporting to TRs: Buy/Sell indicator

a) *In accordance with Article 3a of the Commission Implementing Regulation (EU) No 1247/2012 in case of cross-currency swaps and FX swaps and forwards, the counterparty receiving the currency which is first when sorted alphabetically by ISO 4217 standard shall be identified as the buyer.*

   i. *Should the same rule apply to FX futures?*
   ii. *In the case of FX swaps and cross-currency swaps, where multiple exchanges of currencies take place, which point in time is relevant for the determination of the buyer and seller?*

b) *In accordance with Article 3a of the ITS on reporting to TR in case of basis swaps, the counterparty that pays the spread shall be identified as the buyer and the counterparty that receives the spread shall be identified as the seller.*

   i. *Does the word "spread" refer to the interest rate added to one of the floating rates?*

   ii. *In the case where the spread is variable ("spread schedule"), should the field "Counterparty Side" be updated or remain the same during the life of the contract?*

   iii. *How to determine the direction of the trade in the case of a basis swap where both legs have a spread?*

TR Answer 24

a)
   i. Yes.
   ii. For both types of products, the relevant point in time for the determination of the buyer and seller should be the far leg, which is closer to the maturity date.

b)
   i. Yes

   ii. The direction of the trade should be determined at the beginning of the contract and should remain the same irrespective of the possible changes in the spread value during the life of the contract.

   iii. The counterparty paying the higher spread should be identified as the buyer.

TR Question 25 [Last update: 29 May 2018]

Article 9 of EMIR – Reporting to TRs: Decimal values in fields No 15 and 16

The approach to the reporting of decimal values was clarified in the Annex to the Commission Implementing Regulation (EU) No 1247/2012 . Consequently, this Q&A was no longer relevant and was deleted.

TR Answer 25

Deleted.

TR Question 26

Article 9 of EMIR – Reporting to TRs: Complex Contracts

How the following cases should be reported:

a) *A contract stemming from another contract (e.g. option on a future)*

b) *A transaction with 2 legs*

TR Answer 26

a) If the first contract ceases to exist before giving rise to the second one which is materially different from the first one, the two contracts should be reported separately. Therefore, even though the two contracts are connected in the way they come into existence, they should be reported in two separate reports.

b) Both legs of the contract should be reported in one report, where the combination of fields in the Annex of the Commission Delegated Regulation (EU) No 148/2013 (RTS on reporting to TR) provides for this. Otherwise, a report per leg should be submitted.

TR Question 27 [last update 11 February 2014]

Article 9 of EMIR – 'Leg 1' and 'Leg 2' fields

Which leg of the transaction should be assigned to the 'Leg 1' field and which one to the "Leg 2"?

TR Answer 27

As these fields are included in the Table 2 as Common data, counterparties are expected to agree a consistent approach to assigning each leg to the respective field in the report. Lack of agreement would lead to reconciliation problems at the TR level.

The obligation to agree the reports content stems from the requirement of Article 9(1) of EMIR, 'counterparties and CCPs shall ensure that the details of their derivative contracts are reported without duplication' and is specified in the European Commission's Frequently Asked Questions document Section II Question 5: http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/emir-faqs_en.pdf

TR Question 28 [last update: 29 May 2018]

Article 9 of EMIR – Underlying field

a) *How to populate Table 2 Field 8 (Underlying identification) for a commodity derivative contract where the underlying is not an index or a basket?*

b) *How to populate Table 2 Field 8 (Underlying identification) for FX derivative contracts that are not based on an index or a basket? For example when the underlying is a currency (foreign exchange rate).*

c) *How to populate Table 2 Field 8 (Underlying identification) for a derivative contract where the underlying is a basket?*

d) *How to populate Table 2 Field 8 (Underlying identification) for a derivative contract where the underlying is an index?*

TR Answer 28

a) In the absence of an endorsed UPI, the underlying commodity must be indicated in Section 2h in fields 65 and 66 under the commodity base and commodity details fields respectively. The Underlying field (Table 2, Field 8) cannot be completed in this case and should be populated with an 'NA' value.

b) In the absence of an endorsed UPI, the underlying currency must be indicated under the notional currency fields 9 and 10 and populating the relevant section 2g. The Underlying field (Table 2 Field 8) cannot be completed in this case and should be populated with an 'NA' value.

c) In the absence of an endorsed UPI, the underlying basket must be populated only with individual components traded on a trading venue. Each modification of individual components of basket should be reported.

   When only some securities are to be delivered among a larger basket of securities (e.g. cheapest-to-deliver baskets), 'NA' should be reported and updated with a correct ISIN on the settlement date.

d) The underlying index must be populated with an ISIN code if available: otherwise the full name of the index as assigned by the index provider must be used. The following applies:

   i. The name is identical to the full (trademarked) name as published by the index provider.

   ii. The name of the publisher or administrator is not added to the name insofar it is not an integral part of the trademarked name.

   iii. Characteristics of the index which are captured in separate fields - such as version and series – are excluded in the full name.

   iv. Special characters are to be included in the reported name when they form part of the full (trademarked) name. The validation rules regarding the use of special characters in this field do not apply to indices.

   When the underlying is an index, Field 2.7 must always be populated with "X" irrespective of whether the index is identified with an ISIN or with the full name.

TR Question 29

Article 9 of EMIR – Field 15 for NFC

Are NFCs required to complete Field 15 in Table 1 of the reporting RTS (purpose of the trade) when reporting an exchange traded derivative?

TR Answer 29

Field 15 should be completed when reporting either exchange traded or OTC derivative contracts to indicate whether the trade is directly linked to commercial activity or treasury financing. The reference to article 10(3) of EMIR in Table 1 is to ensure consistency with the concepts of commercial activity and treasury financing in article 10 of EMIR, but does not restrict field 15 to OTCDs. Field 15 shall be populated if the field 94 contains "T".

TR Question 30

Article 9 of EMIR – MIC codes

When completing the Venue of execution field (Table 2, field 15) with a MIC Code, which type of MIC Code should be used?

TR Answer 30

MIC Codes are defined by ISO 10383. This standard identifies two sorts of MIC Code: 'MIC' and 'Operating MIC', also known as 'Segment MIC' and 'Organisation MIC' respectively. For EMIR reports Regulated Markets and MTFs should be identified by the relevant MIC Code as defined in the ESMA Register at http://registers.esma.europa.eu/publication/ .

TR Question 31 [Last update: 29 May 2018]

Article 9 of EMIR – Exchange rate

The approach to the reporting of the exchange rate was clarified in the Annex to the Commission Delegated Regulation (EU) No 148/2013 in is amended form. Consequently, this Q&A was no longer relevant and was deleted.

TR Answer 31

Deleted.

TR Question 32

Article 9 of EMIR – reporting valuations of swaps on structured products

How should counterparties report valuations relating to complex contracts related to the same trading strategy?

TR Answer 32

Where the contracts pertaining to the same strategy have been reported separately, the valuation should be reported on a per contract basis.

TR Question 33 [Last update: 29 May 2018]

Article 9 of EMIR – Collateralisation field

The approach to the collateralization was clarified in Article 3b of the Commission Implementing Regulation (EU) No 1247/2012 . Consequently, this Q&A was no longer relevant and was deleted

TR Answer 33

Deleted.

TR Question 34 [last update: 4 February 2019]

Article 9 of EMIR – Contracts with no maturity date

Some derivative contracts, like Contracts For Difference (CFDs), may not have any specified maturity date and at the moment of their conclusion the termination date is also not specified. Counterparties may at any moment decide to close the contract, with immediate effect. They can also close it partially as counterparties may terminate only a part of the volume on one day and the other part or parts of the contract on any other day. How should these contracts be reported under EMIR?

TR Answer 34

Each opening of a new contract should be reported by the counterparties to the TR as a new entry. This means that each transaction has to be reported with a Unique Trade Identifier and action type “New” or if the trade is included in a position on the same day it can be reported with action type “Position Component", even if they are executed and then netted or terminated for other reasons during the same day. Furthermore, transactions have to be reported even if they are concluded with a counterparty that is not subject to the reporting obligation, such as an individual not carrying out an economic activity and who is consequently not considered as undertakings.

Subsequent transactions do not have to be compressed in a position, however, it is strongly recommended to do so. As these transactions have no maturity, it would imply that without compression each individual transaction by a financial counterparty would need to receive daily valuation updates until either 1) the transaction is cancelled or 2) infinity. Outstanding transactions need valuation updates, but when compressed the valuation can be provided at position level in accordance with the TR Q&A 17.

ESMA considers offsetting transactions to be reportable transactions requiring a Unique Trade Identifier for each transaction. In case transactions are not compressed, offsetting transactions need to be terminated. Once the contract is closed, the counterparty should send a termination report to the initial entry, completing the field “Termination date”. If the contract is closed partially, counterparties send a modification report to the initial entry, reducing only its “Notional amount” (remaining volume is equal to the not yet terminated volume). If there is another partial close, yet another modification report is sent – until the contract is finally closed in whole. Then, the counterparties send a termination report marked as ’C= Early termination’, completing the field “Termination date”. In these cases, the opening price of the contract is reported only in the first report (new) and it is not updated in the following modification reports. Please note that the possibility to modify the notional of a given trade, as just described, should only be used in the event that both parties in fact agree to partially terminate that trade. If however they agree to conclude an offsetting trade with a smaller notional, then a new report is required

TR Question 35 [Last update: 29 May 2018]

Article 9 of EMIR – Notional amount field

The approach to the reporting of changes in notional was clarified in the Annex to the Commission Delegated Regulation (EU) No 148/2013. Consequently, this Q&A was no longer relevant and was deleted.

TR Answer 35

Deleted.

TR Question 36 [last update: 28 May 2019]

Article 9 of EMIR – OTC Derivatives Novations

How should counterparties report OTC derivatives novations?

TR Answer 36

For reporting purposes, only instances where a counterparty (being a CCP or another counterparty) steps into the derivative contract and becomes a new counterparty to the derivative contract should be reported with Action Type "New". For the original report relating to the existing derivative, counterparties should send a *termination* report marked as 'C= Early termination', completing the field "Termination date". The remaining counterparty and the new counterparty should then send a new report with action type "New" relating to the new derivative.

TR Question 37 [last update: 20 May 2021]

Article 81 - Access to data by the competent authorities

According to Article 81(2) EMIR, "A trade repository shall collect and maintain data and shall ensure that the entities referred to in paragraph 3 have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates". Furthermore, Article 2 of Commission Delegated Regulation 151/2013 defines the different filtering criteria for the access to the three levels of data: transaction, position and aggregate.

a) *When referring to access to data by regulators, how "access to all transaction data" needs to be understood? Does it include the details of derivatives which are not accepted by the TR in accordance with the procedures put in place by the TR to comply with the requirements under Articles 19(a) and 19(b) of Commission Delegated Regulation 150/2013, of 19 December 2012? Does it also include the conflicting values of those derivatives trades which are reported to two different TRs following the performance of inter-TR reconciliation process?*

b) *Does a Union competent authority (including the competent authorities of the EU Member States) have access to all transaction data on all derivatives trades concluded by a counterparty that fall within the scope of that authority, whether such counterparty is reported under counterparty data field no. 2 (Counterparty ID) or counterparty data field no. 3 (ID of the other counterparty)?*

c) *Does a competent authority from a Member state have access to all transaction data on all derivatives trades concluded by a counterparty that is from the same Member State?*

d) *Until the adoption of a unique product identifier in the European Union, the reports made to the trade repository in which the underlying is an index or a basket are reported with an "X" or "B" in common data field 7. Which competent authorities have access to the all transaction data of the derivatives where the underlying identification type is reported with an "X" or a "B"?*

TR Answer 37

a) As described in Recital 13 of the Commission Delegated Regulation 151/2013, of 19 December 2012, transaction data should include individual trade details. Irrespective of whether the report for a derivative contract has been accepted or rejected by the TR, in accordance with the procedures put in place by the TR to comply with the requirements under Articles 19(a) and 19(b) of Commission Delegated Regulation 150/2013, of 19 December 2012, these details include the two sets of counterparty data set out in Table 1 of the Annex of Commission delegated regulation No 148/2013 , of 19 of December 2012, and the common data set out set out in Table 2 of the Annex of Commission delegated regulation No 148/2013 , of 19 of December 2012. Given the requirement for TRs to reconcile the details of derivatives under Article 19(c) of Commission Delegated Regulation 151/2013, of 19 December 2012, in those cases where the counterparties report to two different TRs, the transaction data comprises the data sets reported by the two counterparties to the two different TRs.

b) Yes.

c) Yes, as long as it is entitled to it.

d) Union competent authorities should be given access to all transaction data on derivatives when the field "Underlying type" (T2F7) is reported with an "X" or a "B" and the field "Underlying identification" (T2F8) is populated with either:

   i. ISIN of the underlying index or an ISIN belonging to any of the individual components of the underlying basket, whose first two letters represent the country code of that competent authority, or

   ii. an ISIN belonging to any of the individual components of the underlying basket, where the Relevant Competent Authority (RCA) as determined in the FIRDS database is that competent authority, or

   iii. ISIN of the underlying index or an ISIN belonging to any of the individual components of the underlying basket, whose first two letters do not represent the country code of that competent authority, however is needed for that authority in order to perform its responsibilities and mandates, or

   iv. full names (assigned by index providers) of additional indices that, though not identified by ISIN, are needed for that authority in order to perform its responsibilities and mandates.

In that regard, each competent authority should ensure they have provided ESMA with an up to date list of the ISINs and/or full names (assigned by index providers) of additional indices for which that authority also requires access to transaction data if a given index is identified in the report as the underlying index or a component of the underlying basket. That list should be maintained by ESMA, based on the information provided by the authorities, and made available to TRs.

TR Question 38 [Last update: 4 February 2019]

Trades terminated before reporting deadline

How should trades, which are terminated before the reporting deadline, be reported?

TR Answer 38

All contracts reported for the first time should be submitted either with action type as 'NEW' or action type "Position component". However, if an early termination occurs before the reporting deadline, two simultaneous reports should be submitted: one with Action type "NEW" and one with action type "Early termination".

TR Question 39 [last update 24 October 2014. This version is applicable until 17 June 2020.]

Block trades and allocations

How should block trades and allocations be reported?

TR Answer 39

There is a distinction necessary between (i) scenarios where the block trade was concluded by an investment firm and then allocated to clients and (ii) those scenarios where the block trade was concluded by a fund manager without own reporting obligation and then allocated to individual funds.

(i) In the first case the block trade should first be reported by the investment firm. The investment firm should then report the allocations to the individual clients.

(ii) In the second case, in accordance with General Question 1 (a), block trades that are subsequently allocated to individual funds on trade date are not required to be reported. In such cases, the counterparty to the derivative transaction is the individual fund, therefore the allocations should be reported (a) specifying the relevant individual fund (on behalf of which the fund manager has entered into the block trade) as counterparty to the said trade and (b) specifying the allocation of the relevant part of the trade to the relevant individual fund.

Any parts of a block trade that are not allocated on trade date should be reported with the fund manager as the counterparty. This reporting logic would only apply where the allocation post trade date is permitted by the applicable national legislation.

TR Question 39 [last update 24 October 2014. This version shall apply from 18 June 2020].

Block trades and allocations

How should block trades and allocations be reported?

TR Answer 39

There is a distinction necessary between (i) scenarios where the block trade was concluded by an investment firm and then allocated to clients and (ii) those scenarios where the block trade was concluded by a fund manager and then allocated to individual funds.

(i) In the first case the block trade should first be reported by the investment firm. The investment firm should then report the allocations to the individual clients.

(ii) In the second case, in accordance with General Question 1 (a), block trades that are subsequently allocated to individual funds on trade date are not required to be reported. In such cases, the counterparty to the derivative transaction is the individual fund, therefore the allocations should be reported (a) specifying the relevant individual fund (on behalf of which the fund manager has entered into the block trade) as counterparty to the said trade and (b) specifying the allocation of the relevant part of the trade to the relevant individual fund. According to Articles 9(1b) to (1d) EMIR, as amended by Regulation 2019/834, the fund manager must report to TR on behalf of the individual fund.

Any parts of a block trade that are not allocated on trade date should be reported with the fund manager as the counterparty. This reporting logic would only apply where the allocation post trade date is permitted by the applicable national legislation.

TR Question 40 [Last Update: 21 September 2021]

LEI changes due to mergers and acquisitions. Update of identification code to LEI

a) How are TRs expected to treat situations where the counterparty identified in a derivative, reported to them a change in LEI due to a merger, acquisition or other corporate restructuring event or where the identifier of the counterparty has to be updated from BIC (or other code) to LEI because the entity has obtained the LEI? How are counterparties expected to notify the change to their relevant TR?

b) Who should notify the update to LEI or change in LEI of a non-EEA counterparty identified in the field "ID of the other counterparty"? What about the other fields which contain an entity identifier?

c) If the corporate restructuring event affects also the field "Country of the other counterparty", can this field be updated by the TRs alongside the "ID of the other counterparty"?

d) Does the procedure set out in this Q&A apply also in the cases where the reporting counterparty has identified itself with a wrong code, e.g. LEI containing a typo? What should be the procedure when the "ID of the Other Counterparty" field is identified with the wrong code?

e) Under EMIR, delegation to the other counterparty is possible. Hence an entity could appear as reporting counterparty in two or more TRs. There could be an event where reports submitted to different TRs separately refer to a new LEI and an old LEI for the same counterparty. When this happens the TR which is reported the old LEI that identifies that counterparty receives a notification to update the LEI from another TR's broadcast, what is the procedure that should be followed?

TR Answer 40

a) The entity with the new LEI (e.g. merged or acquiring entity or entity which updates its identification to LEI – further "new entity") or the entity to which it delegated the reporting shall notify the TR(s) to which it reported its derivatives about the change and request an update of the identifier in the outstanding derivatives as per point (1) below. If the change of the identifier results from a merger or acquisition, the merged or acquiring entity is also expected to duly update the LEI record of the acquired/merged entity no later than the next LEI renewal date according to the terms of the endorsed pre-LOU/accredited LOU who issued the old LEI.

The TR should identify the outstanding derivatives concerned (as informed by the new entity), where the entity is identified with the old identifier in the field reporting counterparty ID or ID of the other counterparty and replace the old identifier with the new LEI. In the case of corporate restructuring events affecting all outstanding derivatives, the TR shall identify all the outstanding derivatives where the entity is identified with the old identifier in any of the following fields: reporting counterparty ID, ID of the other counterparty, broker ID, report submitting entity ID, clearing member ID, Beneficiary ID, Underlying and CCP ID, Reference Entity and replace the old identifier with the new LEI.

Other corporate restructuring events, such as, but not limited to, partial acquisitions, spin-offs, may affect only a subset of outstanding derivatives, in which case the new entity should accordingly provide the TR with the UTIs of the derivatives impacted by that event.

This is done through the following controlled process:

1. The new entity or the entity to which it delegated the reporting, submits written documentation to the TR(s) to which it reported its derivatives and requests the change of the identifier due to a corporate event or due to the LEI code being assigned to the entity. In the documentation, the following information should be clearly presented (i) the LEI(s) of the entities participating in the merger, acquisition or other corporate event or the old identifier of the entity which updates its identification to LEI, (ii) the LEI of the new entity, (iii) the date on which the change takes place and (iv) the UTIs of the outstanding derivatives concerned.

   In case of a merger or acquisition, the documentation should include evidence or proof that the corporate event has taken or will take place and be duly signed. To the extent possible, the entity should provide the required information in advance so that the change is not done retrospectively, but as of the date specified in (iii). It should be noted that failure to update the identifier on time would result in rejection of the reports submitted by the entity in case where it has been previously identified with an LEI with an appropriate status (i.e. "Issued", "Pending transfer" or "Pending archival") and that status has subsequently been changed to 'Merged'.

2. The TR broadcasts this information to all the other TRs through a specific file, where the (i) old identifier(s), (ii) the new identifier and (iii) the date as of which the change should be done, are included. To the extent possible, the file should be broadcasted in advance so that the change is not done retrospectively, but as of the date specified in (iii).

3. TR(s) should inform the relevant reporting counterparties, report submitting entities, entities responsible for reporting (to the extent that they are participants to the TR) as well as third parties which have been granted access to information under Article 78(7) of Regulation (EU) No 648/2012, as applicable, involved in the derivatives contracts concerned by the LEI change.
4. TR(s) shall notify also the regulators who have access to the data relating to the derivatives that have been updated.

5. The change is kept in the reporting log by each of the TRs.

Subsequent reports should be validated against GLEIF as usual and rejected if the validation fails.

In the event that an LEI update is reported by a counterparty and then needs to be undone, the procedure explained in answer (a) should be followed again by TRs and counterparties.

b) The non-EEA counterparty does not have itself the reporting obligation under EMIR, therefore it cannot follow the procedure set out under point (a) above in order to inform about the change in the identifier. In this case, the EEA reporting counterparty or the entity to which the EEA reporting counterparty delegated the reporting should notify the TR(s) to which it reported its derivatives about the change and request the update of the identifier in the outstanding derivatives following the procedure set out in the point (a).

   It should be noted that when the change in the code occurs due to the obtaining of the LEI by the non-EEA counterparty (i.e. the identifier is updated from other code to LEI), the TR does not need to broadcast the relevant information to other TRs. It is assumed that previously the non-EEA counterparty was identified with the client code which is unique at the level of the reporting counterparty, therefore each reporting counterparty would need to request the update of the identifier of the non-EEA counterparty to its respective TR. In the event that a TR receives multiple requests to change the same client code or LEI, it should contact the requesting counterparties to ensure that the correct amendment is made to the field.

   Due to the above reasons, only an update of the LEI can be undertaken for the field Beneficiary ID. For the rest of the fields containing entity identifier the LEI can only be updated as these fields do not allow for reporting of other identifier.

c) Yes. In those cases where a corporate restructuring event results in a change of country of the new entity (as identified in the country of the legal address in GLEIF database), and that entity is identified in outstanding derivatives concerned by the event in the field “ID of the other counterparty”, the TR should update also the field “Country of the other counterparty”. For that purpose, the entity should notify its TR of the change in the country, in addition to other information listed in the point (a).

d) No. in the case of misreporting of its own identifier, the reporting counterparty should cancel the impacted derivatives with Action Type “Error” and re-report them with a correct LEI and the previously agreed UTI.

   However, if the reporting counterparty has misreported the identifier of the other counterparty, it should cancel and re-report the derivatives contracts in question with the correct LEI and the previously agreed UTI. In this case, if the other counterparty also has the reporting obligation, and it was provided a wrong code, it should also cancel (using Action type “Error”) and re-report the derivatives with the correct LEI and the previously agreed UTI to ensure that both sides can be reconciled.

e) When a TR receives a broadcasted message from another TR which confirms that an old LEI needs to be updated to a new LEI, the TR which received the broadcast must make the update. This includes situations where the TR has not yet been informed of the need for the update by the reporting counterparty itself or the entity reporting on its behalf.

TR Question 41 [last update 04 February 2016]

Reporting of notional in position reports

a) *Does the field "Notional" have to be always populated in reports made at position level?*

b) *How should the field "Notional" be populated for options and futures reported at position level?*

TR Answer 41

a) Yes. As clarified in the TR Q&A 17 which provides guidance on position reporting, where a report is made at a position level, all applicable fields should be populated. This means that all the data elements that are required in trade reports are mandatory as well in position reporting, with the exception of those that are relevant only at trade level.

b) The value to be reported in "Notional" field in position level reports should be calculated as follows:

- For options: Notional = Quantity x Price Multiplier X Strike Price
- For futures: Notional = Quantity x Price Multiplier x Settlement Price

The reporting of modifications to the Notional for positions should take place only if an event relevant for the position has taken place, e.g. a new trade relevant for the position has been concluded and reported.

It should be noted that if any field used to calculate a Notional is populated with "999999999999999,99999" (standing for "not available" in numeric fields), such value should not be used for the relevant calculations

TR Question 42 [last update 28 May 2019, applicable from 17 June 2019]

Population of the field Clearing Obligation

a) *Deleted*

b) *Deleted*

c) *How the field should be populated for:*

(c1) transactions executed on a regulated market

(c2) cleared trades

TR Answer 42

a) Deleted

b) Deleted

c) The field should be populated in following way:

(c1) The field is not applicable to the transactions executed on a regulated market and should be left blank

(c2) In the case of cleared trades, the field “Clearing obligation” should be populated with “N” and the field “Cleared” – with “Y”.

TR Question 43 [last update 26 July 2016]

Trades cleared by a clearing house which is not a CCP

a) When a derivative contract is cleared by an entity which is not a CCP within the meaning of EMIR (e.g. a clearing house), should the clearing house be identified in the field “CCP ID”?

b) How counterparties should identify each other if the transaction is executed in an anonymised market and cleared by a clearing house?

TR Answer 43

a) No. The field “CCP ID” should only be populated with the identifier of a CCP, i.e. a central counterparty which meets the definition of Article 2(1) of EMIR.

b) The counterparty executing the transaction should request the trading venue or the clearing house that matches the counterparties to disclose before the reporting deadline the identity of the other counterparty.

TR Question 44 [Last update 15 July 2019, Paragraphs 1a to 1d of Article 9 apply from 18 June 2020].

Transition to the new EMIR TS on reporting

a) Will the counterparties be obliged to submit reports to update the old outstanding trades upon the application date of the revised technical standards? If so, will those reports have to be submitted in accordance with the revised standards?

b) How will the reports related to old outstanding trades be validated?

c) How the counterparties should report updates related to the outstanding complex derivatives, in the case where they were reported in one report with a single UTI but would be expected to be decomposed and reported in more than one report under the revised rules?

d) Are the expired trades expected to be updated? If so, how will the reports relating to the expired trades be validated?

TR Answer 44

a) As set out in the Article 9(1) of EMIR, “Counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported in accordance with paragraphs 1a to 1f of this Article[17] to a trade repository". Consequently, the counterparties will be required to submit the reports related to the old outstanding trades only when a reportable event (i.e. modification or termination of the trade) takes place. All the reports submitted upon the application data of the revised technical standards on reporting under EMIR must be compliant with those standards, irrespective of when the original trade was concluded.

b) Validation rules to be applied upon the application date of the revised technical standards on reporting will be amended to account for the changes introduced in the revision of the standards. TRs will be expected to apply those rules to all the reports.

   In particular, the TRs will be expected to verify if the report contains all the fields specified as mandatory or conditionally mandatory for a given action type. For example, the counterparties that are obliged to submit daily "Valuation" reports will need to provide the newly required information on the initial and variation margins.

   With respect to the "Modification" and "Correction" counterparties should consider different implementation measures that can be put in place by the TRs:

   - The counterparties that report to the TRs which will require full messages to be sent for the "Modifications" and "Correction" reports will need to provide all the applicable data elements in each report with those action types.

   - In the case of the TRs that accept partial messages for the "Modification" and "Correction" reports (i.e. messages containing only the strictly mandatory fields such as UTI or counterparties' IDs and the fields that are modified/corrected), those TRs will need to ensure that the counterparties provide all the applicable data elements for action type New when sending the "Modification" or "Correction" report for the first time upon the application date of the revised technical standards.

c) When reporting updates related to the outstanding complex derivatives, the counterparties should report in accordance with paragraphs 1a to 1f of this Article[18] and maintain the same reporting logic as applied in the original report with action type "New" so that the UTIs do not have to be agreed retrospectively for historical trades. This means that if a complex derivative contract was originally reported in one report with a single UTI, it is not expected to be decomposed into several reports in order to report a modification or correction of that derivative contract.

d) The expired trades are not expected to be modified. If a counterparty identifies a mistake in the previous submissions and sends a "Correction" report, such report will be validated in accordance with the revised validation rules.

TR Question 45 [last update 05 February 2018]

[17] The requirements under paragraphs 1a to 1d of Article 9 become applicable on 18 June 2020
[18] The requirements under paragraphs 1a to 1d of Article 9 become applicable on 18 June 2020

Operational aspects of data access

Articles 5(7) and 5(8) of Commission Delegated Regulation 151/2013, as amended by Commission Delegated Regulation 2017/1800, establish specific timelines for trade repositories related to the provision of data and to the validation of a request for access to data.

a) How should the TRs comply with these timelines in the case of scheduled maintenance that impacts TR services related to authorities' access to data?

b) How should the TRs comply with these timelines in the case of non-scheduled maintenance at the TR?

TR Answer 45

a) Articles 5(7) and 5(8) of Commission Delegated Regulation 151/2013, as amended by Commission Delegated Regulation 2017/1800 do not refer to the timelines that trade repositories should follow in the event of carrying out scheduled maintenance that impacts TR services related to authorities' access to data, irrespective of the channel or format used.

Trade repositories need to plan carefully the scheduled maintenance that impacts TR services related to authorities' access to data so that it does not coincide with working days determined in accordance with a calendar consistently agreed in the Union such as the Target2 calendar. Where under exceptional circumstances it coincides with such a working day, the scheduled maintenance should be carried out outside normal working hours, i.e. very early in the morning or very late at night. The trade repositories should make sure that the aforementioned scheduled maintenance is not performed in a way that circumvents the timely availability of derivatives information to authorities.

Trade repositories should use electronic means to notify all authorities of the start and end dates and times of their scheduled maintenance windows.

Where an annual planning of scheduled maintenance windows that impact TR services related to authorities' access to data exists at the TR, the TR could notify all authorities of that planning on an annual basis and with at least three working days' notice. Furthermore, any additional specific notifications on scheduled maintenance that impact TR services related to authorities' access to data, that are not notified on an annual basis, should be made at the earliest opportunity and at least three working days before the starting date of the scheduled maintenance that impacts TR services related to authorities' access to data.

Trade repositories should keep a record of the relevant notifications that can be made available to ESMA upon request. The records related to scheduled maintenance notifications should contain, at least, the following information: the timestamp of the notification, of the start and of the end of the scheduled maintenance that impacts TR services related to authorities' access to data and the relevant list of users notified.

In the case of verification of requests under Article 5(8) of Commission Delegated Regulation 151/2013, as amended by Commission Delegated Regulation 2017/1800, trade repositories should confirm receipt and verify the correctness and completeness of any request to access data, at the earliest opportunity and no later than sixty minutes after the finalisation of the relevant scheduled maintenance that impacts TR services related to authorities' access to data.

In the case of access to data under point a) of Article 5(7) of Commission Delegated Regulation 151/2013, as amended by Commission Delegated Regulation 2017/1800, trade repositories should seek to complete the request at the earliest opportunity and no later than 12:00 Universal Coordinated Time on the first calendar day following the day on which the scheduled maintenance that impacts TR services related to authorities' access to data was completed. The timelines in points b) and c) of Article 5(7) remain unaffected.

b) Contrary to point A, in the case of non-scheduled maintenance, the trade repositories should meet the timelines included in Articles 5(7) and 5(8) of Commission Delegated Regulation 151/2013, as amended by Commission Delegated Regulation 2017/1800 and these timelines will be taken as reference when assessing the compliance of the trade repository.

Trade repositories should notify ESMA of the non-scheduled maintenance in accordance with their procedures.

TR Question 46 [last update 29 May 2018]

Reporting of energy derivatives

Given a swap on natural gas or electricity, how should the specific information related to the characteristics of this derivative be reported?

TR Answer 46

Fields specifying the information that needs to be reported on commodity derivatives are between 2.65 and 2.77 of the Commission Delegated Regulation 2017/104.

The following example illustrates how to populate these relevant fields in the case of a peak load swap on the price of electricity in the Spanish wholesale market. The contract is negotiated in MWh/h and the delivery should take place in Q2 2018 for a 100 MWh at 58 euros.

Table	Item	Section	Field	Details to be reported	Format	Example
2	65	Section 2h - Commodities and emission allowances (General)	Commodity base	Indicates the type of commodity underlying the contract	AG = Agricultural EN = Energy FR = Freights ME = Metals IN = Index EV = Environmental EX = Exotic OT = Other	EN
2	66	Section 2h - Commodities and emission allowances (General)	Commodity details	Details of the particular commodity beyond field 65	[for EN only]: OI = Oil NG = Natural gas CO = Coal EL = Electricity IE = Inter-energy OT = Other	EL

Table	Item	Section	Field	Details to be reported	Format	Example
2	67	Section 2h - Commodities and emission allowances (Energy)	Delivery point or zone	Delivery point(s) of market area(s)	EIC code, 16 character alphanumeric code Repeatable field.	**10YES-REE------0**
2	68	Section 2h - Commodities and emission allowances (Energy)	Interconnection Point	Identification of the border(s) or border point(s) of a transportation contract	EIC code, 16 character alphanumeric code	**XXXXXXXXXXXXXXXX**
2	69	Section 2h - Commodities and emission allowances (Energy)	Load type	Identification of the delivery profile	BL = Base Load PL = Peak Load OP = Off-Peak BH = Hour/Block Hours SH = Shaped GD = Gas Day OT = Other	**PL**
2	70	Section 2h - Commodities and emission allowances (Energy)	Load delivery intervals	The time interval for each block or shape	hh:mmZ	**08:00Z**
2	71	Section 2h - Commodities and emission allowances (Energy)	Delivery start date and time	Start date and time of delivery	ISO 8601 date in the UTC time format YYYY-MM-DDThh:mm:ssZ	**2018-04-01T08:00:00Z**
2	72	Section 2h - Commodities and emission allowances (Energy)	Delivery end date and time	End date and time of delivery	ISO 8601 date in the UTS time format YYYY-MM-DDThh:mm:ssZ	**2018-06-30T19:59:59Z**
2	73	Section 2h - Commodities and emission allowances (Energy)	Duration	The duration of the delivery period	N=Minutes H= Hour D= Day W=Week M=Month Q = Quarter S= Season Y= Annual O=Other	**Q**
2	74	Section 2h - Commodities and emission allowances (Energy)	Days of the week	The days of the week of the delivery	WD = Weekdays WN = Weekend MO = Monday TU = Tuesday WE = Wednesday TH = Thursday FR = Friday SA = Saturday SU = Sunday Multiple values separated by "/ " are permitted	**WD**
2	75	Section 2h - Commodities and emission allowances (Energy)	Delivery capacity	Delivery capacity for each delivery interval specified in field 70	Up to 20 numerical digits including decimals	**100**

Table	Item	Section	Field	Details to be reported	Format	Example
					The decimal mark is not counted as a numerical character. If populated, it shall be represented by a dot. The negative symbol, if populated, is not counted as a numerical character.	
2	76	Section 2h - Commodities and emission allowances (Energy)	Quantity Unit	Daily or hourly quantity in MWh or kWh/d which corresponds to the underlying commodity	KW KWh/h KWh/d MW MWh/h MWh/d GW GWh/h GWh/d Therm/d KTherm/d MTherm/d cm/d mcm/d	**MWh/h**
2	77	Section 2h - Commodities and emission allowances (Energy)	Price/time interval quantities	If applicable, price per quantity per delivery time interval	Up to 20 numerical characters including decimals. The decimal mark is not counted as a numerical character. If populated, it shall be represented by a dot. The negative symbol, if populated, is not counted as a numerical character.	**58**

TR Question 47 [last update 29 May 2018]

Reporting of deliverable currencies

How should the fields Deliverable currency and Delivery currency 2 be populated (Table 2 fields 11 and 61)?

TR Answer 47

The Deliverable currency field should be populated for all single currency derivatives, as well as those with a specific FX component. The field should be populated as the currency of the underlying to be delivered in the case of a physically settled derivative or the settlement currency, if the derivative is to be cash settled.

The Delivery currency 2 field should be populated for those derivatives with an FX component for which two currencies are delivered. If both Deliverable currency and Delivery currency 2 are populated, the field Deliverable currency should be populated with the first currency sorted in alphabetical order.

TR Question 48 [last update 29 May 2018]

Reporting of Effective date

How should the Effective date (Table 2 Field 26) be reported if it is not specified as part of the terms of the contract?

TR Answer 48

In such case the counterparties should populate this field with the date of execution of the derivative.

TR Question 49 [last update 26 September 2018, applicable from 26 September 2019]

Reporting of FX swaps

a) How should an FX swap be reported under Article 9 of EMIR?

b) How should a lifecycle event affecting a single leg of a swap be reported under Article 9 of EMIR?

TR Answer 49

a) Following scenarios are considered:

- Scenario A: Reporting of an FX swap composed of a spot and forward leg.
- Scenario B: Reporting of an FX swap composed of two forward legs.

In both scenarios the derivatives have the following characteristics:

- Banks A and B enter in a EUR/GBP swap instrument on 1 June 2018 (regardless of how the instrument has been subsequently confirmed or settled);
- notional of the contract: 1M€;
- maturity date of the contract: 31 December 2018;
- the swap is physically settled;
- Bank A sells EUR and gets GBP for the near leg (and delivers GBP and receives EUR for the far leg);
- the exchange rate of the near leg is 0.88 EUR/GBP, while the exchange rate of the far leg is 0.865 EUR/GBP.

In the case of forward-forward swap, the two settlement dates are 30/11/2018 and 02/01/2019.

The relevant fields in the report should be populated as follows:

List of fields				Scenario A:FX spot-forward	Scenario B: FX forward-forward	Comments
1	1	Parties to the contract	Reporting timestamp	2018-06-01T12:00:00Z	2018-06-01T12:00:00Z	
1	2	Parties to the contract	Reporting Counterparty ID	LEI Bank A	LEI Bank A	
1	4	Parties to the contract	ID of the other Counterparty	LEI Bank B	LEI Bank B	

List of fields				Scenario A:FX spot-forward	Scenario B: FX forward-forward	Comments
1	14	Parties to the contract	Counterparty side	B	B	The counterparty[19] that for the far leg (which is closer to the maturity date) is delivering the currency which is first when sorted alphabetically by ISO 4217 standard should be identified as seller. Bank A sells EUR and gets GBP for the near leg (and delivers GBP and gets EUR for the far leg), therefore it should be identified as the buyer.
2	1	Section 2a - Contract type	Contract type	SW	SW	
2	2	Section 2a - Contract type	Asset class	CU	CU	
2	3	Section 2b – Contract information	Product classification type	C	C	
2	4	Section 2b – Contract information	Product classification	SFAXXP	SFCXXP	
2	9	Section 2b – Contract information	Notional currency 1	EUR	EUR	
2	10	Section 2b – Contract information	Notional currency 2	GBP	GBP	
2	11	Section 2b – Contract information	Deliverable currency	EUR	EUR	
2	12	Section 2c - Details on the transaction	Trade ID	123456	123457	
2	14	Section 2c - Details on the transaction	Complex trade component ID			FX swap is reported in a single report and is not a complex trade, therefore this field is left blank.

[19] As per Article 9 EMIR, and Question 24 of the Q&A No 648/2012 on OTC derivatives

List of fields				Scenario A:FX spot-forward	Scenario B: FX forward-forward	Comments
2	17	Section 2c - Details on the transaction	Price / rate	-0.015	-0.015	The price of the contract is given in swap points expressed in units of quoted currency per unit of base currency
2	18	Section 2c - Details on the transaction	Price notation	U	U	
2	19	Section 2c - Details on the transaction	Currency of price	GBP	GBP	
2	20	Section 2c - Details on the transaction	Notional	1000000	1000000	
2	21	Section 2c - Details on the transaction	Price multiplier	1	1	
2	22	Section 2c - Details on the transaction	Quantity	1	1	
2	24	Section 2c - Details on the transaction	Delivery type	P	P	
2	25	Section 2c - Details on the transaction	Execution timestamp	2018-06-01T12:00:00Z	2018-06-01T12:00:00Z	
2	26	Section 2c - Details on the transaction	Effective date	2018-06-01	2018-06-01	
2	27	Section 2c - Details on the transaction	Maturity date	2018-12-31	2018-12-31	
2	28	Section 2c - Details on the transaction	Termination date			
2	29	Section 2c - Details on the transaction	Settlement date	2018-06-03	2018-11-30	

List of fields				Scenario A:FX spot-forward	Scenario B: FX forward-forward	Comments
	29a		Settlement date 2	2019-01-02	2019-01-02	
2	61	Section 2g – Foreign Exchange	Delivery currency 2	GBP	GBP	
2	62	Section 2g – Foreign Exchange	Exchange rate 1	0.88	0.88	
2	63	Section 2g – Foreign Exchange	Forward exchange rate	0.865	0.865	
2	64	Section 2g – Foreign Exchange	Exchange rate basis	EUR/GBP	EUR/GBP	
2	93	Section 2k - Modifications to the contract	Action type	N	N	
2	94	Section 2k - Modifications to the contract	Level	T	T	

b) The following scenario is considered:

- The derivative is concluded on 1 June 2018;
- notional of the contract: 1M€;
- maturity date of the contract: 31 December 2018;
- the swap is physically settled;
- Bank A sells EUR and gets GBP for the near leg (and delivers GBP and receives EUR for the far leg);
- the exchange rate of the near leg is 0.88 EUR/GBP, while the exchange rate of the far leg is 0.865 EUR/GBP;
- the two settlement dates are 01/08/2018 and 02/01/2019.

On 17 July there is a compression of the near leg, while the far leg continues. Therefore the FX swap needs to be terminated with Action Type “Compression” and the FX forward contract arising from this compression has to be reported with a new UTI.

This way of reporting is envisaged only in the cases where lifecycle events impact a single leg of an FX swap. It should not be followed in case of a normal settlement of a near leg, as envisaged in the original contract.

According to the validation rules the fields highlighted in orange are not relevant for Action Type “Compression” and should not be populated.

List of fields				New report (for a swap)	Compression (for leg 1)	New report (for leg 2)	Comments
1	1	Parties to the contract	Reporting timestamp	2018-06-01T12:00:00Z	2018-07-17T12:00:00Z	2018-07-17T12:00:00Z	
1	2	Parties to the contract	Reporting Counterparty ID	LEI Bank A	LEI Bank A	LEI Bank A	
1	4	Parties to the contract	ID of the other Counterparty	LEI Bank B	LEI Bank B	LEI Bank B	
1	14	Parties to the contract	Counterparty side	B		B	
2	1	Section 2a - Contract type	Contract type	SW		FW	
2	2	Section 2a - Contract type	Asset class	CU		CU	
2	3	Section 2b – Contract information	Product classification type	C		C	
2	4	Section 2b – Contract information	Product classification	SFCXXP		JFRXFP	
2	9	Section 2b – Contract information	Notional currency 1	EUR		EUR	
2	10	Section 2b – Contract information	Notional currency 2	GBP		GBP	
2	11	Section 2b – Contract information	Deliverable currency	EUR		EUR	
2	12	Section 2c - Details on the transaction	Trade ID	123456	123456	789ABC	
2	14	Section 2c - Details on the transaction	Complex trade component ID				
2	17	Section 2c - Details on the transaction	Price / rate	-0.015		0.865	
2	18	Section 2c - Details on the transaction	Price notation	U		U	

List of fields				New report (for a swap)	Compression (for leg 1)	New report (for leg 2)	Comments
2	19	Section 2c - Details on the transaction	Currency of price	GBP		GBP	
2	20	Section 2c - Details on the transaction	Notional	1000000		1000000	
2	21	Section 2c - Details on the transaction	Price multiplier	1		1	
2	22	Section 2c - Details on the transaction	Quantity	1		1	
2	24	Section 2c - Details on the transaction	Delivery type	P		P	
2	25	Section 2c - Details on the transaction	Execution timestamp	2018-06-01T12:00:00Z		2018-06-01T12:00:00Z	
2	26	Section 2c - Details on the transaction	Effective date	2018-06-01		2018-07-17	
2	27	Section 2c - Details on the transaction	Maturity date	2018-12-31		2018-12-31	
2	28	Section 2c - Details on the transaction	Termination date		2018-07-17		
2	29	Section 2c - Details on the transaction	Settlement date	2018-08-01		2018-12-31	
	29a		Settlement date 2	2018-12-31			
2	61	Section 2g – Foreign Exchange	Delivery currency 2	GBP		GBP	
2	62	Section 2g – Foreign Exchange	Exchange rate 1	0.88			

List of fields				New report (for a swap)	Compression (for leg 1)	New report (for leg 2)	Comments
2	63	Section 2g – Foreign Exchange	Forward exchange rate	0.865		0.865	
2	64	Section 2g – Foreign Exchange	Exchange rate basis	EUR/GBP		EUR/GBP	
2	93	Section 2k - Modifications to the contract	Action type	N	Z	N	
2	94	Section 2k - Modifications to the contract	Level	T	T	T	

TR Question 50 [last update: 4 February 2019]

Reporting of Confirmation Means

When should the value ‘N’ be used for the Confirmation Means field?

TR Answer 50

The value ‘N’ (not confirmed) should be used either when:

- The derivative has to be confirmed by the counterparties but has not been confirmed yet;
- The derivative does not have to be confirmed by the counterparties because it has been traded on a trading venue and once traded all the terms of the contracts are known and agreed by the parties.

In other cases, the counterparties should report the ‘E’ or ‘Y’ value for this field depending on the confirmation means used (electronic or non-electronic).

TR Question 51 [last update 31 March 2021]

Article 9(1) of EMIR – Reporting obligation

(a) *When can counterparties start notifying the national competent authorities (NCAs) of their intention to apply the reporting exemption in accordance with Article 9(1) EMIR, as amended by Regulation 2019/834?*

(b) *On which day does the three-month period referred to in Article 9(1) EMIR, as amended by Regulation 2019/834, start?*

(c) From and until when is the reporting exemption valid in accordance with Article 9(1) EMIR, as amended by Regulation 2019/834?

(d) Do the counterparties need to report during the three-month period?

(e) According to Article 9(1)(c) EMIR, as amended by Regulation 2019/834, the parent undertaking should not be a financial counterparty. How should the reference to "parent undertaking" be understood?

(f) Can the parent undertaking provide the notification for the group?

(g) When notifying of their intention to apply the exemption from the reporting obligation in accordance with Article 9(1) EMIR, as amended by Regulation 2019/834, what should the counterparties communicate to their NCAs in this respect?

(h) When counterparties of the same group established in at least two different EU member states notify their NCAs of their intention to apply a reporting exemption under Article 9(1) EMIR, as amended by Regulation 2019/834, do the NCAs need to agree on whether the conditions laid down in Article 9(1) EMIR, as amended by Regulation 2019/834, are met, and if not, what applies then?

(i) Is it necessary for the Commission to have adopted an implementing act (equivalence decision) under Article 13(2) EMIR in order for the reporting exemption under Article 9(1), as amended by Regulation 2019/834, to apply to derivatives entered into between a counterparty established in the Union and a counterparty established in a third country which would be an NFC if it were established in the Union?

(j) May a derivative contract between a Financial Counterparty (FC) and non-financial counterparty (NFC) be eligible for an intragroup exemption from reporting if:

- *the FC belongs to both a group of undertakings referred to in Article 3(1) or Article 80(7) and (8) of Directive 2006/48/EC (CRD), and another group referred to in Articles 1 and 2 of Directive 83/349/EEC, and*
- *the NFC merely belongs to the group under Articles 1 and 2 of Directive 83/349/EEC?*

(k) Once the reporting exemption is valid, what actions should counterparties that benefit from the exemption undertake with regards to derivatives that are still outstanding?

(l) Once the reporting exemption ceased to be valid due to a change in any of the conditions, referred to in the third sub-paragraph of Article 9(1) EMIR, as amended by Regulation 2019/834, what actions should the concerned counterparties undertake with regards to the derivatives that are outstanding?

(m) In the case of derivatives contracts where at least one of the counterparties is a non-financial counterparty: does the exemption of reporting obligation for intra-group transactions introduced in Article 9(1) of EMIR REFIT apply when the parent undertaking is established in a third country?

TR Answer 51

a) Counterparties can notify of their intention to apply an exemption from the reporting obligation as soon as Regulation 2019/834 (REFIT) comes into force. However, some competent authorities may allow counterparties to notify ahead of that date.

b) The three-month period starts on the later of the calendar day following receipt of the notification(s) by the relevant NCA(s) and the calendar day following the entry into force of EMIR, as amended by Regulation 2019/834.

c) The exemption shall be valid from the date when the NCA(s) confirm(s) to the counterparty(ies) that the conditions to use the exemption are satisfied, or if no decision is notified by the NCA(s), it will be valid from the end of the three-month non-objection period. If the conditions, referred to in the third sub-paragraph of Article 9(1) EMIR, as amended by Regulation 2019/834, change, the counterparties need to inform the relevant NCAs. Without prejudice to the existing exemption, the NCA(s) can object to the use of the exemption due to the change in the conditions. From that point in time the exemption will not be valid.

d) The counterparties need to report during the three-month period unless the NCA(s) notify(ies) the counterparty(ies) that they agree upon fulfilment of the conditions before the three-month period expires.

e) The parent undertaking for the purpose of the requirements for the exemption under Article 9(1) EMIR, as amended by Regulation 2019/834, should be considered the ultimate parent undertaking of the group relevant for the consolidation on a full basis, centralised risk evaluation, measurements and control procedures with regards to the counterparties for which the exemption is notified. It is not necessary that these procedures are established at the level of the whole group of the ultimate undertaking, rather they should be applicable for the counterparties notifying the exemption from reporting.

f) Counterparties will need to submit their notifications to their respective NCAs in accordance with the procedures adopted by those NCAs in each member state. If this is acceptable for the respective NCA, the parent undertaking may provide a single notification identifying each entity of its group situated within that member state for which exemption is requested. It is not necessary that the parent undertaking is a counterparty to a derivative contract, neither that it is located in the member state where it submits a notification.

g) When notifying of their intention to apply the exemption from the reporting obligation in accordance with Article 9(1) EMIR, as amended by Regulation 2019/834, the notifying counterparty should state that it fulfils the conditions laid down in Article 9(1) EMIR, as amended by Regulation 2019/834 and, if applicable, should indicate the other NCA(s) that have been notified with regards to the counterparty(ies) included in the notification. The NCA may ask for additional information and/or documents to assess the fulfilment of the conditions referred to in the third subparagraph of Article 9(1) EMIR, as amended by Regulation 2019/834.

h) Each NCA needs to consider whether the conditions laid down in Article 9(1) are met. NCAs may disagree on the fulfilment of these conditions. Where one of the NCAs considers that the conditions are not fulfilled, it shall notify the counterparty in its member state as well as the other NCA(s) within the three-month period of the receipt of the notification and specify the reasons.

Counterparties may renotify of their intention to apply the reporting exemption under Article 9(1) EMIR, as amended by Regulation 2019/834, once they consider they have addressed the objection(s) raised by the objecting NCA(s).

For the avoidance of doubt, if counterparties notify their respective NCAs on different dates, they should wait until the end of the later of the two three-month periods before relying on the exemption (provided neither NCA objected) or until all relevant NCAs agree on the fact that the conditions laid down in Article 9(1) EMIR, as amended by Regulation 2019/834, are met. The reporting exemption for the derivative contracts concluded by the relevant counterparties is not valid, if one NCA has objected to it. Therefore, the derivatives concluded between the counterparties, that are included in the notification, should continue to be reported.

i) No, this is not necessary.

j) Yes. In accordance with the definition of 'group' in Article 2(16) EMIR, as amended by Regulation 2019/834, such a contract may be eligible for an intragroup reporting exemption if the NFC, while not consolidated under the CRD, is part of the same consolidated non-financial group as the FC.

k) Counterparties that benefit from the exemption should send reports with Action type "E = Error" for all the derivative contracts with the counterparties for which the reporting exemption is valid.

l) The counterparties concerned should report the outstanding derivatives with Action type "N = New" and provide all the relevant details of those derivatives as they stand on the date when the exemption ceases to be valid, and report all subsequent lifecycle events as they occur. It is not necessary to report the modifications to the derivative that occurred between the date of conclusion of that derivative and the date when the exemption ceased to be valid. If the outstanding derivatives were previously cancelled with Action type "E = Error" at the moment when the exemption was granted, the counterparties should report such derivatives with a new UTI so that the reports are not rejected in accordance with the EMIR validation rules[20].

m) ***Answer provided by the European Commission in accordance with article 16b(5) of the ESMA Regulation***[21]

[20] Validation for the field 2.93 Action type: "Only one report with the action type "New" for a given combination of Counterparty ID-ID of the other counterparty-Trade ID shall be accepted". Available at: https://www.esma.europa.eu/sites/default/files/library/esma74-362-853_emir_validation_rules_for_revised_rts_its.xlsx

[21] DISCLAIMER: The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice

The exemption contained in Article 9(1) of EMIR does not cover intragroup transactions for which the parent undertaking is established in a third country, even if the transaction occurs between two counterparties which are both established in the EU. This conclusion is based on the following elements:

1. The definition of parent undertaking refers to an undertaking governed by the law of a Member State and nothing in EMIR indicates a will to modify that reference.

2. This interpretation fits the actual purpose of Article 13 of EMIR: deference is granted where there is equivalence with the jurisdiction hosting the parent undertaking.

3. This interpretation ensures a meaningful use and purpose of the transparency objective of Article 9 while limiting the exemption in article 9(1) to the minimum necessary.

TR Question 52 [last update 15 July 2019]

Article 9 of EMIR – Notional amount field for credit index derivatives

How should counterparties report the Notional (field 2.20) for credit derivatives trades following a change in the index factor (field 2.89) due to credit events?

TR Answer 52

To avoid double counting of the adjustment, counterparties should not modify the notional (field 2.20) when the index factor changes due to credit events. They should only update the index factor (field 2.89).

TR Question 53 [last update 20 May 2021]

Article 9(1) of EMIR – Reporting of reference rates not included in Regulation (EU) 2017/105

To ensure consistency of reporting, it is important to clarify how the counterparties should report derivatives based on reference rates that are not included explicitly in the Regulation (EU) 2017/105, such as €STR. In particular:

(a) How the fields related to floating rate should be populated?

(b) How the fields related to underlying should be populated?

of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

(c) *Specifically, in the case of outstanding derivative contracts referencing EONIA, should the counterparties report to the TRs when change the reference rate from EONIA to €STR? How the counterparties should report in other similar scenarios, e.g. in the case of transition from LIBOR to risk-free rates?*

(d) *In the case of derivatives that are identified with an ISIN, should the counterparties modify also the field 2.6 Product ID?*

TR Answer 53

(a) At the time the Regulation (EU) 2017/105 was developed, €STR was not yet available, therefore the list of standardised codes for reporting of floating rate specified in this Regulation (for the fields 2.55 Floating rate of leg 1 and 2.58 Floating rate of leg 2) does not provide the code for reporting of this reference rate. Consequently, the counterparties need to use the free-text field to report €STR.

In order to ensure consistent reporting and enable the reconciliation of the reports in question, counterparties should report in the free-text field "ESTR", i.e. the 4-letter code assigned to €STR in the ISO 20022 standard.

Similarly, for other reference rates that are not included in the list of standardised codes, counterparties should report in the free-text field the 4-letter code assigned to that reference rate is the ISO 20022 standard, to the extent it is available, as described in ISO 20022 Benchmark Curve Name Code at the following link.

(b) In the case of field 2.8 Underlying identification, counterparties should report ISIN assigned to a given rate, e.g. in the case of €STR it is "EU000A2X2A25". If ISIN is not available for a given rate, the counterparties should report the full name of that index as assigned by the index provider.

It should be noted that the field 2.7 Underlying identification type should be populated with the value "X" standing for "Index".

(c) Yes. When the counterparties agree to change the reference index of the outstanding derivative contract from EONIA to €STR, they need to send the report with action type "Modify" to the trade repository. Similarly, once EONIA is discontinued, the counterparties that either actively transition to €STR or rely on the contractual fallback, will need to send the modification reports to the TRs.

The same approach should be applied in the case of other changes of the reference rates of the derivative. For example, in the case of LIBOR cessation the counterparties should report a modification of the derivative when the fallbacks are triggered. It should be noted that once the fallback is triggered, from the economic perspective the derivative is based on the fallback rate, thus the counterparty should report the modification (and update the relevant fields) even if the reference to LIBOR is maintained in the legal contract.

(d) Yes. Given that the derivative based on the fallback rate will be assigned a different ISIN than the equivalent derivative based on LIBOR, the counterparties should update the ISIN of the derivative when switching to a different rate.

TR Question 54 [last update 28 May 2020]

Reporting of OTC derivative contracts by the FC on behalf of the NFC- pursuant to the Article 9(1a) of EMIR as amended by EMIR REFIT

(a) Which of the reportable details specified in the Annex to the Regulation (EU) 2017/104 should be provided by the NFC- (which decides not to report itself) to the FC to enable the latter to report on behalf of the NFC- pursuant to the Article 9(1a) of EMIR as amended by EMIR REFIT?

(b) How should a FC proceed if the NFC- which decides not to report itself does not duly renew its LEI and therefore the reports submitted on its behalf are rejected by a Trade Repository?

(c) How should a FC proceed if an NFC that has been classified as an NFC+ changes its status to NFC- and decides not to report itself, but fails to timely inform the FC of this fact?

(d) How should FC and NFC- proceed if they report to two different TRs? Do they need to onboard to the TR of their counterparty?

TR Answer 54

(a) According to Article 9(1a) of EMIR as amended by EMIR REFIT, the NFC- should provide the FC with the details of the OTC derivative, which the FC cannot be reasonably expected to possess.

It is understood that the FC cannot not be expected to possess the reportable details characterising the NFC- itself (e.g. sector of the counterparty) nor the details of the execution and clearing arrangements entered into by the NFC itself (e.g. identity of the NFC's broker or of the NFC's clearing member).

Therefore, having in mind the scope of information required under the Regulation (EU) 2017/104, it is understood that NFC- should provide to the FC the following details:

i. Field 1.2 Reporting counterparty ID
ii. Field 1.6 Corporate sector of the counterparty
iii. Field 1.7 Nature of the counterparty
iv. Field 1.8 Broker ID (if unknown by FC)
v. Field 1.10 Clearing Member (if unknown by FC)
vi. Field 1.11 Type of ID of the beneficiary (if beneficiary is different from the NFC-)
vii. Field 1.12 Beneficiary ID (if beneficiary is different from the NFC-)
viii. Field 1.13 Trading capacity
ix. Field 1.15 Directly linked to commercial activity or treasury financing.
x. Field 1.16 Clearing threshold

The reportable details in points (i)-(iii) and (x) are static information not related to a specific derivative, meaning that they can be provided by the NFC- on a one-off basis and updated immediately each time when any of such details changes. Other reportable details specified in the points (iv)-(ix) should be provided for each OTC derivative concluded between the FC and the NFC-.

If the NFC- has not provided to the FC the reportable details specified above, the FC should submit the missing reports without undue delay as soon as it receives all the relevant details.

(b) Financial counterparty should timely liaise with the NFC- so that the latter renews its LEI.

It should be noted that in accordance with Article 9(1a) of EMIR as amended by EMIR REFIT, the NFC- is responsible for ensuring that the details of the OTC derivative contracts provided to the FC are correct. As clarified in point (a), field 1.2 Reporting counterparty ID is one of the details that NFC should provide to the FC. Therefore, the NFC- should ensure that its LEI is correct (thus also valid and duly renewed as per the TR Q&A 10b and the validation rules) so that FC can perform the reporting of OTC derivatives on its behalf.

If the NFC- has not timely renewed its LEI and therefore FC was not able to successfully report on behalf of NFC-, the FC should submit the missing reports without undue delay as soon as the LEI of the NFC- is renewed.

(c) In accordance with answer (a) above, field 1.16 Clearing threshold is part of the details of the OTC derivative contracts that NFC- should provide to the FC. To the extent possible, the NFC- should inform the FC of an anticipated change in its status ahead of the date of calculation of its positions pursuant to the Article 10(1) of EMIR as amended by EMIR REFIT to avoid any disruption in the continuity of reporting.

Given that the status of the NFC is known and primarily assessed by the NFC itself, it is thus part of information that the FC cannot be reasonably expected to possess, it is understood that in the case where NFC+ has become an NFC- and does not inform the FC of this change, the FC may not be aware of its obligation to report on behalf of that NFC-.

When FC becomes aware of such change after the calculation date, it should submit the missing reports pertaining to the OTC derivatives that were concluded, modified or terminated after that date without undue delay. Such submissions should be done, upon having received from the NFC all relevant details (as per (a) above) pertaining to these derivatives.

(d) For any outstanding OTC derivatives where an FC and an NFC- report to two different Trade Repositories, and the NFC- decides not to report itself, the outstanding OTC derivatives of the NFC- should be transferred to the TR of the FC as of 18/06/2020, unless the FC decides to become client of the TR of the NFC- and report the OTC derivatives concluded with the NFC- to that TR.

Each time a NFC changes its status from NFC+ to NFC-and decides not to report itself its OTC derivatives, it should transfer its outstanding OTC derivatives concluded with the FC to the TR of that FC as of the date of its changed status unless the FC decides to become client of the TR of the NFC- and report the OTC derivatives concluded with the NFC- to that TR. Similarly, each time when NFC changes its status from NFC- to NFC+, the outstanding OTC derivatives concluded with the FC should be transferred back to the TR of the NFC, unless the NFC decides to become client of the TR of the FC and report the OTC derivatives concluded with the FC to that TR. Any such transfer of OTC derivatives between the TRs of any pair of FC-NFC should be performed following the principles of the Guidelines on transfer of data between Trade Repositories 22(in particular, the derivatives subject to transfer should not be cancelled and re-reported by the counterparties, but rather transferred as specified in the Guidelines).

[22] https://www.esma.europa.eu/sites/default/files/library/esma70-151-552_guidelines_on_transfer_of_data_between_trade_repositories.pdf

For the performance of data transfer, neither the NFC nor the FC (or any report submitting entity reporting on their behalf) are expected to onboard to the TRs of the other counterparty. The reference to TR participant in the aforementioned Guidelines should relate to the NFC and FC (or the report submitting entity reporting on their behalf), as appropriate. For example, in the case of transfer from the TR of the NFC- to the TR of the FC, the reference to the TR participant of the old TR should be read as a reference to the NFC-, whereas the reference to the TR participant of the new TR – as a reference to the FC. Furthermore, the NFC- should provide to the FC the relevant verifications regarding the outstanding OTC derivatives subject to transfer included in Sections A and C of the Annex I to the Guidelines, when derivatives are transferred to the TR of the FC, and the FC should provide to the NFC+ those verifications, when derivatives are transferred to the TR of the NFC+.

TR Question 55 [last update 24 September 2020]

Reporting of reference entity for credit derivatives

Should the reference entity be reported with an LEI or with an ISO 3166 country code?

TR Answer 55

ISO 3166 and ISO 3166-2 codes should only be used in the case of credit derivatives where the reference entity is a supranational, a sovereign or a municipality, respectively. In all other cases the reference entity should be identified with an LEI.

TR Question 56 [last update 24 September 2020]

Correct population of fields "Execution timestamp", "Effective date" and "Settlement date" for Forward Rate Agreements

How should the fields "execution timestamp", "effective date", "maturity date" and "settlement date" be reported for Forward Rate Agreement derivatives (FRAs)?

TR Answer 56

When reporting FRAs, counterparties should populate the fields as follows:

Execution timestamp should be populated with the relevant date and time when the derivative was concluded by the counterparties and following the specifications in the validation table.

Effective date is the date when obligations under the contract come into effect. Unless the obligations between the counterparties are postponed to a future date, this is the same as the date part of the execution timestamp. Effective date is not the settlement date referred to in the FRA documentation.

Maturity date is the date agreed by the counterparties when the obligations under the derivative expire. In the case of FRAs, this is the date on which the exposures between the counterparties are extinguished by the determination of the payment covering the difference between the agreed rate and the prevailing market rate. This is not the final date of the underlying rate.

Settlement date is the date on which the counterparties settle the underlying. The underlying of a FRA is a forward interest rate and the settlement of the difference between the agreed rate and the prevailing market rate either coincides with the maturity date or it takes place on a later date.

TR Question 57 [last update 28 January 2021]

Procedure for terminating 'dead trades' by TRs

(a) What actions should be undertaken with regards to outstanding derivatives records at a trade repository when the reporting counterparty ceases to exist without being acquired or merged, i.e. it is dissolved?

(b) What actions should be undertaken with regards to outstanding derivatives records at a trade repository when the reporting counterparty has been dissolved and has not terminated them?

TR Answer 57

(a) Where a counterparty ceases to exist, without being acquired or merged, no derivatives should remain outstanding at the trade repository.

If the reporting counterparty reports directly to the TR, and notifies the TR in order to cancel its membership, the TR should liaise with the reporting counterparty to terminate the relevant derivatives, while it is still active, by submitting reports with action types "ETRM" where the termination date is at the latest the date of the dissolution of the reporting counterparty.

If the reporting counterparty does not report directly to the TR, and the entity responsible for reporting (ERR) or report submitting entity (RSE) notifies the TR, the TR should liaise with that entity to terminate the relevant derivatives, while the reporting counterparty is still active, by submitting reports with action types "ETRM" where the termination date is at the latest the date of the dissolution of the reporting counterparty.

(b) Where the reporting counterparty has ceased to exist and has not terminated the outstanding derivatives, the following waterfall should be followed:

1. If the entity responsible for reporting (ERR) is different from the reporting counterparty and that ERR has not used report submitting entity (RSE), the TR should contact the ERR, should request the submission of reports with action types "ETRM" where the termination date is at the latest the date of the dissolution of the reporting counterparty and, simultaneously, should raise the issue to the NCA of the reporting counterparty. If the reporting counterparty or the ERR has used a RSE and that entity is still an active report submitting entity (RSE) at the TR, the TR should contact the RSE, should request the submission of reports with action types "ETRM" where the termination date is at the latest the date of the dissolution of the reporting counterparty and, simultaneously, should raise the issue to the NCA of the reporting counterparty;
2. if the first step is not applicable, the TR should assess the maturity date of the outstanding derivatives that should be terminated to assess whether they would naturally expire in the following twelve months;
3. if the second step is not applicable, the TR should contact the other counterparty/ies to the outstanding derivatives, where those entities report directly to the TR, and request them to terminate the outstanding transactions on behalf of the reporting counterparty while, if possible, raise the issue to the NCA(s) to follow-up with the other counterparty/ies;

4. finally, in case none of the above is applicable, the TR, upon confirming with the NCA and notifying ESMA, should flag the relevant derivatives accordingly and not take them into consideration for the purposes of trade state reports or any subsequent aggregations.

TR Question 58 [last update 20 May 2021]

Reporting of the field 'Delivery type' for Credit derivatives

(a) The field 2.24 'Delivery Type' allows for the values "C" ('Cash'), "P" ('Physical') and "O" ('Optional for counterparty or when determined by a third party'). How should a counterparty report the field 'Delivery type' for credit derivatives, in particular in the case of credit event auction?

TR Answer 58:

(a) Auctions are organised, and counterparties may subscribe to it only once a given credit event occurs. Thus, at the time of concluding the derivative it is not known whether the counterparties would participate in an auction. Furthermore, the credit protection buyer/seller may subscribe to the credit event auction individually, meaning that not necessarily both counterparties to the derivative would participate in the auction.

While the underlying instruments can be sold and physically delivered in the auction, the actual credit derivative would be cash-settled (as one counterparty, protection buyer, would receive from the other counterparty the cash compensation for the non-retrievable part of the underlying instruments and they would not have exchanged the underlying).

Therefore, the counterparties should report "C" ('Cash') in the field 'Delivery type' for credit derivatives that are cash-settled, including where one or both counterparties subscribe to a credit event auction.

For the avoidance of doubt, the counterparties should report "P" ('Physical') in the case of physical delivery of the underlying of the credit derivative from the counterparty that is protection buyer to the other counterparty.

***new* TR Question 59** [last update 23 March 2023]

Inclusion of derivatives in the Trade State Report (TSR)

(a) Should the derivatives maturing on day T be included in the TSR for that day?

(b) Should the counterparty be allowed to 'reopen' a derivative by modifying the maturity or termination date to a future date once the derivative expired or was terminated?

TR Answer 59

(a) Yes, the TRs should ensure that derivatives that mature on a given day should still be included in the TSR for that day. For the avoidance of doubt, the derivatives that were terminated or cancelled on a given day with any of the following action types: 'E', 'C', 'P' or 'Z', should not be included in the TSR for that day.

(b) No, it is not possible to change the status of the derivative from non-outstanding to outstanding by modifying the maturity or termination date.

Modification or correction of a maturity date to a future date should be allowed only until the day following the previously reported maturity date. In the case of modifications or corrections reported after that day, the new maturity date should be earlier than the date part of the field 'Reporting Timestamp' (Field 1.1).

With regards to the termination date, it cannot be modified nor corrected to a future date once the derivative was terminated with action type 'C', 'Z' or 'P', therefore. counterparties should use these action types diligently. In the case of modifications or corrections reported after the submission of a report with action type 'C', 'Z' or 'P', the new termination date should be earlier than the date part of the field 'Reporting Timestamp' (Field 1.1).

Part IV: Reporting to TRs – Transaction scenarios

Date last updated: 21 December 2020

All scenarios are aligned to the new technical standards on reporting applicable from 1 Nov 2017

This part of the Q&As document provides for a description of the reports that shall be transmitted by counterparties, CCPs or third entities on their behalf to a TR in a number of key scenarios. It should be noted that:

- any reference to 'counterparties' in this Annex shall be construed within the meaning of the definition provided under Article 2(8) and (9) of EMIR[23];
- the list of scenarios is only an indicative one for the basic cases and shall therefore not be considered as exhaustive, further guidance being issued at a later stage;
- whenever an EU counterparty deals with a non-EU counterparty, the former shall report the relevant derivative irrespective of the fact that the non-EU counterparty is subject to reporting obligations in its home jurisdiction;, any exemption to report, such as for ESCB members, or non-coverage by the reporting obligation, such as for entities not incorporated in the EU, does not represent an exemption to be reported by the other counterparty (the one that effectively is under the duty to report, unless also the other counterparty is not subject to the obligation) – that EU entity would have to report under EMIR and report also the identity of its non-EU counterparty;

[23] (8) 'financial counterparty' means an investment firm authorised in accordance with Directive 2004/39/EC, a credit institution authorised in accordance with Directive 2006/48/EC, an insurance undertaking authorised in accordance with Directive 73/239/EEC, an assurance undertaking authorised in accordance with Directive 2002/83/EC, a reinsurance undertaking authorised in accordance with Directive 2005/68/EC, a UCITS and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC, an institution for occupational retirement provision within the meaning of Article 6(a) of Directive 2003/41/EC and an alternative investment fund managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU; (9) 'non-financial counterparty' means an undertaking established in the Union other than the entities referred to in points (1) and (8).

– although all fields are mandatory, not all will be filled by counterparties in all cases, as they may not apply for certain reasons - one common reason is that the field does not apply to the trade (i.e. fields regarding a class different from the class of the derivative being reported) and another one, the fact that the fields do not apply to the type of counterparty (e.g. multilateral development banks and the classification of counterparties as financial and non-financial).

– individuals not carrying out an economic activity and who are consequently not considered as undertakings (see European Commission FAQ no. 14) are not subject to the reporting obligation under EMIR, only bodies as defined in Article 2(8) and (9) of EMIR; therefore, in all examples below, when such an individual is a counterparty to a trade, he does not have reporting obligations; the other counterparty, in case it is not another individual, will have the obligation to report the trade to a trade repository, including the internal code of the individual with whom it has concluded the transaction;

– delegation of reporting is a possibility under EMIR, including:

  - one counterparty delegates on the other counterparty;
  - one counterparty delegates on a third party;
  - both counterparties delegate on a single third party;
  - both counterparties delegate on two different third parties;

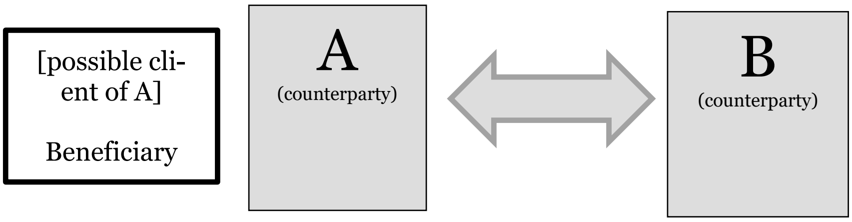
– all the examples below will be compatible with any of the possibilities above in case the two counterparties do not report directly: following the principle of avoiding duplication and ensuring reporting, ESMA is favourable to centralised reporting (i.e. by the venue in which a non-OTC has been concluded or by the CCP in which it is being cleared); however, this should be always a matter of agreement by the counterparties, based on voluntary delegation arrangements;

– since the obligation to report lies always on the counterparties to a trade, whenever a third party is performing that function through a previous agreement (on behalf of one or both counterparties), it shall ensure that all relevant data are provided by the counterparties to fulfil the reporting obligation;

– it is important to take into account that investment firms that provide investment services (like execution of orders or receipt and transmission of orders) do not have any obligation to report under EMIR unless they become a counterparty of a transaction by acting as principal: nothing prevents counterparties to a derivative to use an investment firm (as a broker) as a third party for TR reporting, but this is a general possibility in all cases, thus the examples below do not develop that possibility further.

– the cases herein follow an operational perspective with a view to efficient reporting to TRs, rather than the exact legal structure and number of contracts within a derivatives transaction, notably ETDs. This is consistent with the approach taken in the Commission Delegated Regulation no. 148/2013 as amended by the Commission Delegated Regulation 2017/104 (notably Article 2 on cleared trades) under which the reference to the 'trading venue' should be interpreted in line with the clarifications provided in the ETDs Reporting Question 1(1).

Case 1: Bilateral, non-cleared trade (basic case)

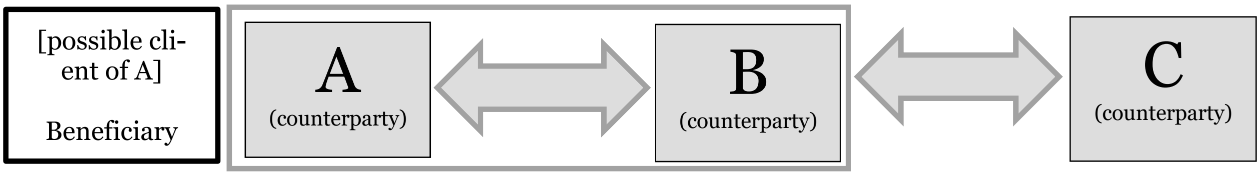


No specific provisions apply to this case. Both counterparties have an obligation to report.

Both identify the other as counterparty. A should identify its client, if any, as beneficiary in its report.

Should parties agree to centrally clear this type of bilateral transaction, reporting duties do not change. The CCP could however centralise reporting, should counterparties and the CCP agree on such delegation.

Case 2: Principal trades in a chain

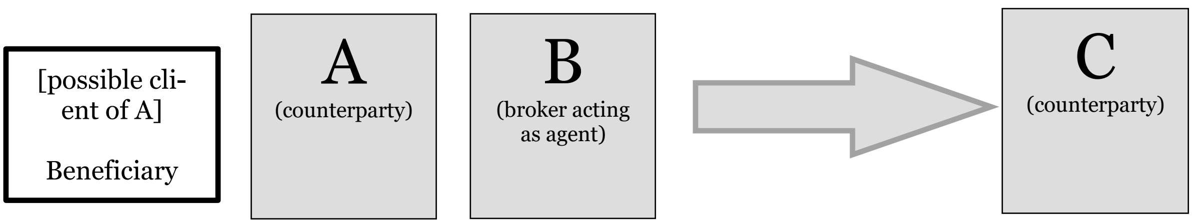


A is a client of B. They conclude a transaction that is back-to-back to another transaction that B is concluding with C.

All 3 counterparties (i.e. each of the two counterparties to the two contracts) have the duty to report.

B acts as principal in both trades and is therefore considered as a counterparty of both under EMIR, being thus under the duty to report the contract, reporting A as counterparty in the first trade and C as its counterparty in the second trade. C and A will name B as their counterparty.

Case 3: Counterparty dealing bilaterally with another counterparty through a broker

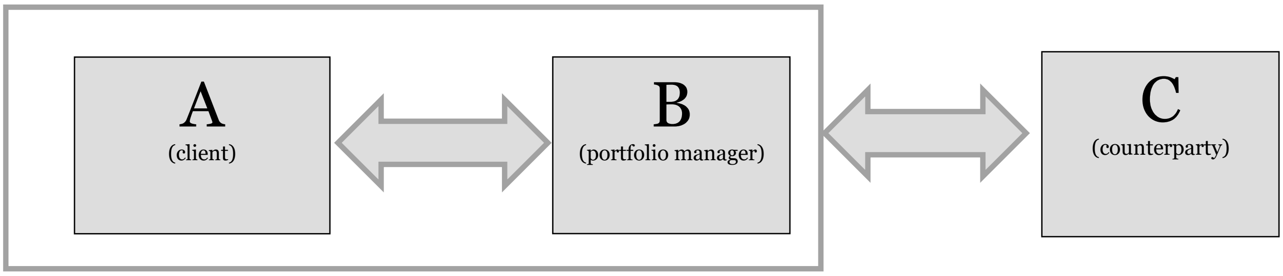


B acts as agent (introducing broker). B is not signing or entering into any derivative contract with A or C and is therefore not considered as a counterparty under EMIR, thus not being under the duty to report.

A and C are the counterparties and have the duty to report. They will know each other as they will sign a bilateral agreement (derivative), even if B acts as an intermediary.

B should be identified as broker by A and C in their reports. A should identify its client, if any, as beneficiary in its report.

Case 4: Counterparties in the context of portfolio management



B is offering the investment service of portfolio management to its client A (it qualifies as counterparty according to EMIR). In this context, B - in its capacity as the portfolio manager of A - enters into a derivative contract with C (C is a bank or a financial institution).

Whether this is to be considered as one single derivative contract between Counterparty A and Counterparty C or as two derivative contracts (one between A and B and another between B and C) depends on the risk position borne by B. If B bears the risk vis-à-vis C, B will be deemed the counterparty to the derivative contract with C and it will report two trades:

- One trade identifying C as its counterparty in the field "ID of the other counterparty"
- The other trade identifying A as its counterparty in the field "ID of the other counterparty"

In cases where, depending on the legal arrangements, B does not bear any risk towards C whereas it is A who bears directly the risk towards C, B will not be deemed counterparty to the derivative contract and thus will not have a reporting obligation for the given derivative contract. In this case A will be the counterparty of C and vice versa.

Part V: Reporting to TRs – ETD contracts reporting

Date last updated: 21 December 2020

All scenarios are aligned to the new technical standards on reporting applicable from 1 Nov 2017

ETDs Reporting Question 1

What is the scope of reporting covered by these questions and answers?

ETDs Reporting Answer 1

The questions and answers relating to the reporting of "ETD contracts" cover the reporting of the conclusion[24] of derivative contracts in any of the classes referred to in paragraphs 1 and 2 of Article 5 of the Commission Implementing Regulation (EU) No 1247/2012 that meet all of the following criteria.

1. The contract is subject to the rules of a trading venue[25] and is executed in compliance with those rules or on a similar trading venue outside the EU (note that this similarity point is only to be interpreted for the purpose of deciding which trades are covered by this section of questions and answers and does not imply any status for non-EU trading venues for any other purpose);

2. The rules of the trading venue provide for processing of the concluded contract by the trading venue after the execution and the subsequent clearing by a CCP within one working day of execution; and

3. The trade is cleared by a CCP.

ETDs Reporting Question 2 [last update 26 January 2024]

Which parties have to report ETD contracts?

ETDs Reporting Answer 2

modified One of the main purposes of the EMIR reporting obligation is to enable the authorities to identify and analyse risk positions, although the reports will have other uses as well. Therefore, an authority analysing EMIR reports would expect to see the counterparties where the risk lies once the contract has been concluded.

Under the principal clearing model, upon clearing, the risk lies on the clearing member ("CM") vis-à-vis the CCP and on the client of the CM vis-à-vis the CM.

Under this clearing model, when the client of the CM is an investment firm, the latter bears the risk arising from the derivative transaction vis-a-vis the CM, regardless of the investment service provided to its own clients.

In order to achieve the objective of identifying risk positions, all of the following will be deemed to be counterparties of the trades arising from a derivative transaction and thus having an EMIR reporting obligation:

1. The CCP clearing the derivative contract.

2. The clearing members of the CCP that are clearing the derivative contract.

[24] To be understood as any trade that gives rise to a derivative contract.
[25] As defined in Article (2)24 of the Directive 2014/65/EU

3. The MiFID investment firms involved in the trade chain anytime they bear the risk arising from the derivative transaction by virtue of its contractual relationship with their counterparties (in particular, with the clearing member).

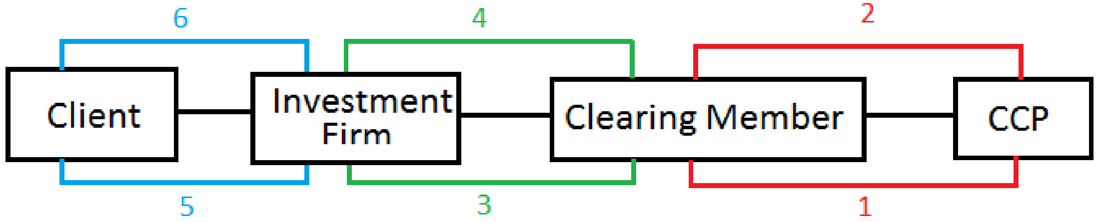
4. Other parties that do not fall into any of the categories above and that take the risk arising from the derivative transaction, except when they are exempt because of their status.

All these parties have an obligation to report any trades with their own counterparties arising from a derivative contract The latter holds true irrespective of whether they are in a “back to back” situation between two other parties or whether they bear the risk arising from a derivative contract vis-à-vis their counterparties according to a different arrangement, whereby the legal and economic effects of the contract are transferred to them.

Where an entity is fulfilling more than one of these roles (for example, where the investment firm is also the clearing member) then it does not have to report separately for each role and should submit one report identifying all the applicable roles in the relevant fields.

To show how this approach would work in practice to report the conclusion of a derivative contract, we use as an example a trade scenario in which a derivative contract is executed via an investment firm and cleared through a separate clearing member of the CCP. Only one side of the trade is described.

Scenario 1: the investment firm bears the risk vis-à-vis the CM and, thus, is itself counterparty. In this case the following reports should be submitted:



Report	Who has the reporting obligation[26]?	Trade ID[27]	Report tracking number	Reporting Counterparty ID (2)	ID of the other counterparty (3)	Broker ID (8)	Clearing member ID (10)	Beneficiary ID (11)	Trading capacity (12)[28]	Counterparty side (13)	Venue of execution	CCP
1	Clearing member	UTI001	RTN1	Clearing member	CCP		Clearing Member	Clearing member	'P'	'B'	MIC	CCP
2	CCP	UTI001	RTN1	CCP	Clearing member		Clearing member	CCP	'P'	'S'	MIC	CCP
3	Investment firm	UTI002	RTN1	Investment firm	Clearing member		Clearing member	Investment firm	'P'	'B'	MIC	CCP
4	Clearing member	UTI002	RTN1	Clearing member	Investment firm	~~Investment firm~~	Clearing member	Clearing member	'P'	'S'	MIC	CCP
5	Client	UTI003	RTN1	Client	Investment firm	~~Investment firm~~	Clearing member	Client	'P'	'B'	MIC	CCP
6	Investment firm	UTI003	RTN1	Investment firm	Client		Clearing member	Investment firm	'P'	'S'	MIC	CCP

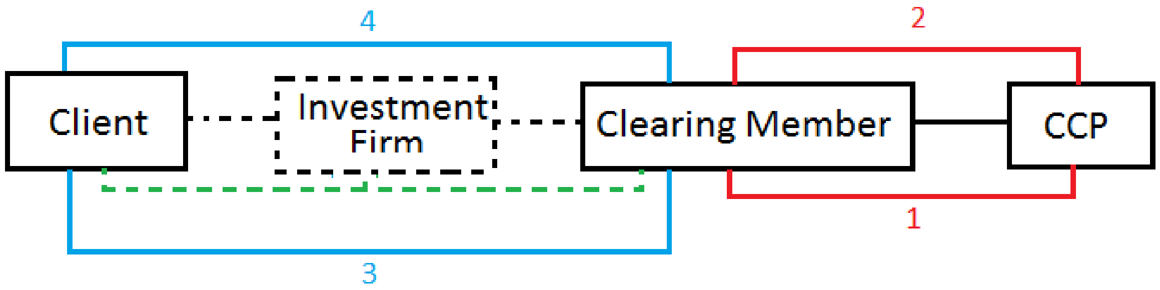
[26] This column was inserted to clarify reporting obligations; it is not part of the reportable fields under Commission Delegated regulation (EU) No 148/2013.
[27] See ETD reporting question 5.
[28] This field refers to the trading capacity of the counterparty with the reporting obligation.

It should be noted that this reporting scenario should be applied in all cases where the investment firm bears the risk towards its counterparty (i.e. the CM) either where the investment firm executes the order o where it intervenes in the transaction by receiving and transmitting the order.

In cases where, depending on the legal arrangements, the investment firm does not bear the risk towards its counterparty, the trade will be reported according to scenario 2.

Other trading scenarios are of course possible.

Scenario 2: the investment firm does not bear any risk vis-à-vis the clearing member as, according to the legal arrangements, the client bears directly the risk vis-à-vis the clearing member, once the latter accepts the contract for clearing.



Report	Who has the reporting obligation[29]?	UTI	Report tracking number	Counterparty ID (2)	ID of the other counterparty (3)	Broker ID (8)	Clearing member ID (10)	Beneficiary ID (11)	Trading capacity (12)[30]	Counterparty side (13)	Venue of execution	CCP ID
1	Clearing member	UTI001	RTN1	Clearing member	CCP		Clearing member	Clearing member	'P'	'B'	MIC	CCP
2	CCP	UTI001	RTN1	CCP	Clearing member		Clearing member	CCP	'P'	'S'	MIC	CCP
3	Client	UTI002	RTN1	Client	Clearing member	Investment firm	Clearing member	Client	'P'	'B'	MIC	CCP
4	Clearing member	UTI002	RTN1	Clearing member	Client	Investment firm	Clearing member	Clearing member	'P'	'S'	MIC	CCP

[29] This column was inserted to clarify reporting obligations; it is not part of the reportable fields under Commission Delegated regulation (EU) No No 148/2013.
[30] This fields refers to the trading capacity of the counterparty with the reporting obligation.

ETDs Reporting Question 3

How should give-ups be reported?

ETDs Reporting Answer 3

Where a give up occurs from the investment firm to the clearing member within the T+1 reporting deadline and there has not been any change of the economic terms of the original trade the trade should be reported in its post give up state according to the second reporting scenario illustrated in ETD question 2 above.

ETDs Reporting Question 4

Do partial executions have to be reported separately?

ETDs Reporting Answer 4

As parameters (e.g. price, time) and also counterparts (on markets which do not act anonymously) of partial executions of a trade will be different, each single execution shall be reported separately.

ETDs Reporting Question 5

How Trade IDs and Report Tracking Number (RTN) should be assigned?

ETDs Reporting Answer 5

The Report Tracking Number (Table 2 Field 13) is a unique number assigned to the execution and common among a group of reports related to the same execution. It is a mandatory field for action type 'P' at the trade level. In order to ensure uniqueness across reports relating to the same execution, the RTN should be based on a unique code assigned to this execution. The generation of the RTN should have its origin in a centralised infrastructure (e.g. the trading venue or the CCP). The tracking number should be by default the execution code assigned by the trading venue. In case this is not feasible or available due to the market model, a code generated at the clearing level by the CCP can be used.

The reporting counterparties are expected to obtain that tracking number from the trading or clearing confirmations that they receive from the investment firm or from the clearing member or CCP. They are also expected to transmit the tracking number to their counterparties to allow them to fulfil their reporting obligations.

A non-exhaustive list of trading/clearing cases and how the RTN should be populated is the following

Scenario	Approach to reporting TRN
There is a one-to-one relationship between the reports (e.g. one execution for a single client cleared through a single clearing member).	The RTN is a single code to be used in all the reports listed in the scenarios above
There is a one-to-n relationship, (e.g. a single execution is allocated to n clients who clear either through one or several clearing members).	The same RTN will be used for all n clients and for all the reports listed in the scenarios above.
There is a n-to-one relationship (e.g. several executions at a trading venue are aggregated at an average price for a single client who clears through one clearing member).	A code relating to any of the several executions which are subsequently aggregated shall be used. It is suggested to use the code of the last of the executions that were aggregated.

ETDs Reporting Question 6

How should the time stamps be populated?

ETDs Reporting Answer 6

The Execution timestamp (Table 2 Field 25) should correspond to the time of execution on the trading venue of execution.

The Clearing timestamp (Table 2 Field 36) should be reported as the time at which the CCP has legally taken on the clearing of the trade.

For markets where clearing takes place using the open offer model, these two times are expected to be the same.

For markets where clearing takes place using novation, these two times may be different.

ETDs Reporting Question 7

Who should report the value of the collateral for ETDs?

ETDs Reporting Answer 7

The Initial margin posted (Table 1 Field 24), the Variation margin posted (Table 1 Field 26), the Initial margin received (Table 1 Field 28), the Variation margin received (Table 1 Field 30), the Excess collateral posted (Table 1 Field 32) and the Excess collateral received (Table 1 Field 34) should be reported by the Counterparty responsible for the report (the entity identified in the 'who has the obligation to report' column in the scenarios above, that is the participant identified in Table 1 Field 2 in Commission Delegated Regulation (EU) No 148/2013 (RTS on reporting to TR) .

In the particular case when the investment firm is not involved in the process of receiving and/or posting any collateral for the client because of the direct arrangements between the client and the clearing member, the investment firm is not expected to submit any report on the value of the collateral, or on any subsequent modification as well as termination of the concluded derivative contract.