esma European Securities and Markets Authority

Questions and Answers

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

22 October 2013 | ESMA/2013/1527

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;

3. The European Commission has already released some Frequently Asked Questions on EMIR[1] to clarify the timing and the scope of EMIR, together with certain issues related to third country CCPs and trade repositories.

4. 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 and was updated on 6 June 2013 and 5 August. This document is expected to be updated and expanded as and when appropriate.

2. Purpose

5. 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.

6. 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.

3. Status

7. 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.[2]

8. 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.

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

9. 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

10. 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.

11. Questions on the practical application of any of the EMIR requirements, including the requirements in EMIR's technical standards, may be sent to the following email address at ESMA: EMIR-questions@esma.europa.eu

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 – also referred to as "the Regulation"
ESMA	The European Markets and Securities Authority
ETD	Exchange Traded Derivatives
FC	Financial Counterparty
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
SPV	Special Purpose Vehicle
TR	Trade Repositories
UTI	Unique Transaction Identifier

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General Questions

Last update: 5 August 2013

General Question 1: Funds, counterparties [Last update: 5 August 2013]

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

General Answer 1:

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:

(a) 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.

(b) 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. The fund manager can report to TRs on behalf of the funds without prejudice to the funds liability for meeting the reporting obligation. In that situation, the ID of the fund manager shall be provided as the reporting entity ID.

(c) 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 contract. 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 shall be provided as the reporting entity ID.

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.

Part I: OTC Derivatives

Last update: 5 August 2013

OTC Question 1 [last update 5 August 2013]

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;

(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 non-EU exchanges;

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

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 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 non-EU exchanges that are equivalent to a regulated market in accordance with Article 19(6) of MiFID do not count for the purpose of the determination of the clearing threshold. Derivatives traded in other non-EU exchanges will count for the determination of the clearing threshold. Article 19(6) states that the European Commission shall publish a list of those exchanges that are to be considered as equivalent. To date, there is no publicly available list of non-EU exchange equivalent to a regulated market, as envisaged under Article 19(6) of MiFID. In the absence of this list, all derivative contracts executed on non–EU exchanges should be counted for the purpose of the determination of the clearing threshold.

(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 ex-

ecution 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.

Derivatives transactions that do not meet the conditions listed in the first paragraph of this subanswer (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.

OTC Question 2 [last update 20 March 2013]

Article 10 of EMIR – Procedure for NFC to notify that they exceed/cease to exceed the clearing threshold

(a) When do NFC have to start calculating the clearing threshold (CT) and notify a breach of the CT?

(b) Should the non-financial counterparty notify the relevant NCA and ESMA only on the first day it exceeds the threshold, or every day during the 30 business day period mentioned in EMIR Article 10(1)(b)?

(c) Should all entities of the group notify the relevant NCA and ESMA, or should there be a single notification per group?

OTC Answer 2

(a) As soon as the Commission Delegated Regulation (EU) No 149/2013 (ESMA RTS on OTC derivatives) enter into force (i.e. on 15 March 2013), non-financial counterparties will have to start calculating the CT and to send a notification to ESMA and the relevant NCA when they are above the clearing threshold.

(b) Non-financial counterparties shall notify the relevant NCAs and ESMA only on the first day that they exceed any of the clearing thresholds. In accordance with EMIR Article 10(1)(b), they will become NFC+ if the rolling average position over 30 working days exceeds the threshold. NFC shall re-notify as soon as possible the relevant NCAs and ESMA when their average position over 30 working days does not exceed the clearing threshold any longer.

(c) For each Member State in which the group has legal entities which trade OTC derivatives, a notification should be submitted to the NCA once the group has exceeded the threshold. This notification must include, among other things, the names of all NFC group legal entities within that Member State which trade OTC derivatives. The group should also submit a single notification to ESMA, listing all of the NFC group legal entities within the EU which trade OTC derivatives.

OTC Question 3 [last update 5 August 2013]

Article 10 of EMIR – Calculation of the clearing threshold

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

(b) Should the following OTC derivative transactions be counted against the clearing threshold:

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

(c) What is the relation between intragroup and the corresponding external transactions?

OTC Answer 3

(a) Counterparties are expected to use updated exchange rates every time they calculate the total position to be compared to the clearing threshold.

(b.1) If two NFC group entities enter into an intragroup transaction with each other which does not fall within the hedging definition[3], both sides of the transaction should be counted towards the threshold. The total contribution to the group-level threshold calculation would therefore be twice the notional of the contract. For non-hedging intragroup transactions between one NFC and one FC, only the NFC side of the transaction needs to be counted.

(b.2) OTC contracts cleared on a voluntary basis are included in the calculation of the clearing threshold.

(b.3) As per Article 10(3), only the positions taken by non-financial entities of the same group count for the calculation of the clearing threshold.

(b.4) Positions taken by third-country non-financial entities in the same group as the non-financial counterparty, which would be non-financial counterparties if they were in the EU, count for the calculation of the clearing threshold.

(b.5) No, only the positions of fully consolidated subsidiaries should be taken into account.

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

(c) In a group typically there is one, or more, company that is specialised in dealing in derivatives with entities outside the group. This trading company 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 threshold, where the derivative contracts concluded by the group non-trading NFC qualify as hedging contracts, then the correspondent external contracts should also be considered as hedging contracts. On the contrary, where the derivative contracts concluded by the group non-trading NFC do not qualify as hedging contracts, then the correspondent 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 a group non-trading NFC, 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 a NFC
- B is a 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 threshold 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.

OTC Question 4 [last update 20 March 2013]

Article 11 of EMIR – Responsibility of the FC and NFC

Is the FC responsible for assessing whether its counterparty is a NFC above or below the clearing threshold?

OTC Answer 4

NFCs which trade OTC derivatives are obliged to determine their own status against the clearing threshold. FCs should obtain representations from their NFC counterparties detailing the NFC's status. FCs are not expected to conduct verifications of the representations received from NFCs detailing their status and may rely on such representations unless they are in possession of information which clearly demonstrates that those representations are incorrect.

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 5 August 2013]

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?

OTC Answer 6

(a) In both cases, notifications for the exemptions from the clearing obligation for intragroup transactions and for pension scheme arrangements are not expected to be submitted before the first notification as referred to in Article 5 of EMIR (notifications from NCA to ESMA of the authorised classes of OTC derivatives) is received by ESMA i.e. the date on which the first class of OTC derivatives is notified to ESMA and published in the Public Register in accordance with EMIR Article 6(2)(f) and the RTS on OTC Derivatives Article 8(5).

However, NCAs may facilitate the process of those 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.

OTC Question 7 [last update 20 March 2013]

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 will contain two types of information:

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

   This section of the register will be published after the notifications are received by ESMA under the procedure described in Article 5(1) of EMIR, i.e. following the authorisation of CCPs under EMIR to clear classes of OTC derivatives.

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 20 March 2013]

Notional amounts

When calculating the positions in OTC derivatives to be compared to the clearing thresholds, NFCs shall use gross notional amounts. How should the notional amounts be calculated for the following instruments:

(a) Options

(b) Contracts for difference (CFD)

(c) Commodity derivatives which are designated in units such as barrels or tons

(d) Contracts where prices will only be available by the time of settlement

(e) Contracts with a notional amount that varies in time

OTC Answer 9

Nominal or notional amounts are the reference amount from which contractual payments are determined in derivatives markets. It can also be defined as the value of a derivative's underlying assets at the applicable price at the transaction's start. This definition should be applied to derive the notional amount of contracts listed in points (a) to (c).

Regarding (d), the notional amount should be evaluated using the price of the underlying asset at the time the calculation of the positions in OTC derivatives to be compared to the clearing thresholds is made.

Regarding (e), the notional amount to be considered is the one valid at the time the calculation of the positions in OTC derivatives to be compared to the clearing thresholds is made.

The same approach described in the paragraphs above should be adopted for reporting purposes (field 14 of table 2 of Commission Delegated Regulation (EU) No 148/2013).

OTC Question 10 [last update 5 August 2013]

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?

OTC Answer 10

(a) ** **modified** ** 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:

i. 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.
ii. 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.
iii. 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.
iv. 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
v. 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 rela-

tive terms), all OTC derivative transactions are classified as hedging, and once this limit is exceeded, all OTC derivative transactions are classified as non-hedging.

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:

- the portfolio is purely directional and does not allow any offsetting transactions;
- 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;
- 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 5 August 2013]

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

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

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:

- Timely confirmation: the confirmation timeframes applicable to NFC- are specified in Article 12(2) of the RTS on OTC derivatives
- Portfolio reconciliation: the reconciliation frequency applicable to NFC- is specified in Article 13(3)(b) of the RTS on OTC derivatives
- Portfolio compression, under the conditions defined in Article 14 of the RTS on OTC derivatives
- Dispute resolution, as further specified in Article 15(1) of the RTS on OTC derivatives

OTC Question 13 [last update 5 August 2013]

Status of Entities not established in the Union

(a) How should a counterparty determine whether an entity established in third countries would be a financial counterparty 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-?

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. 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- were it 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 threshold. In line with OTC Q&A no. 4, EU counterparties might obtain representations from their third country counterparties detailing the NFC's 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 counterparty's status under EMIR, firms should assume that their counterparty status is NFC+ and apply EMIR requirement accordingly.

OTC Question 14 [last update 5 August 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?

(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?

OTC Answer 14

(a) For those counterparties, a portfolio reconciliation shall be made each year. The first one shall be made within one year from the entry into force of the RTS on OTC derivatives, i.e. before 15 March 2014.

(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.

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 predefined 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.

Part II: CCPs

Last update: 5 August 2013

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[4]. This concept is therefore not compatible with a situation where the CCP would have procedures 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.

[4] *'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'.*

CCP Question 3 [last update 20 March 2013]

Article 48 of EMIR – Collateral portability:

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

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

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

(c) Port the proceeds from liquidation of assets, less outstanding variation margin payments; or

(d) Port the assets themselves, less outstanding variation margin payments?

CCP Answer 3

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.

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) [old Question 6] 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 4 June 2013]

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 [Old question 7]?

(b) By when must a CCP be fully compliant with EMIR [Old question 14]?

(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 [Old question 14]?

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.

CCP Question 7 [last update 4 June 2013, old question 8]

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 5 August 2013]

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) *[Old question 9]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) *[Old question 10]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) *[Old question 11]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?*

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.

(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[5]. 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 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

[5] *See Recital 64 of EMIR.*

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.

CCP Question 9 [last update 4 June 2013]

Article 41 of EMIR – Margin requirements:

(a) [Old question 12]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) [Old question 13]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?

(c) [Old question 13]For the purposes of the procyclicality provision of Article 28(1)(c) of Commission Delegated Regulation (EU) No 153/2013, what confidence intervals should be used by a CCP in order to calculate the margin requirements?

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.

(c) Article 28(1) of the RTS on CCP requirements establishes three options (not mutually exclusive) for a CCP to limit procyclicality in margin requirements. In particular, the third one envisages that a CCP shall ensure that its margin requirements are not lower than those that would be calculated using volatility estimated over a 10 year historical lookback period. In applying this lookback period, the same confidence interval and liquidation period as envisaged to comply with Article 24 and 25 of the RTS on CCP requirements should apply– see sub-answer a.

CCP Question 10 [last update 4 June 2013, old Question 15]

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 4 June 2013, old question 16]

Article 47 of EMIR – Investment Policy:

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

CCP Answer 11

Article 45(2) of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP requirements) 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).

CCP Question 12 [last update 4 June 2013, old question 17]

Article 42 of EMIR – Default Fund:

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?

CCP Answer 12:

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.

CCP Question 13 [last update 5 August 2013]

Article 26 of EMIR – Organisational requirements:

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?

CCP Answer 13

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.

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 or by any board member also being a member of the board of other entities of the same group…"

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?

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.

Part III: Trade repositories

Last update: 5 August 2013

TR Question 1 [last update 5 August 2013]

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?

TR Answer 1

(a) These financial instruments should be classified as interest rates. 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 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.

There are two fields for the notional amount currency and one for the notional amount. To avoid that one counterparty report the notional amount in CCY1 while the other would report in CCY2, which would create a reconciliation problem, the Field “Notional Amount” should be denominated in the currency reported in “Notional currency 1”.

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)[6] 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.

[6] 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 3 [last update 5 August 2013]

Article 9 of EMIR – Reporting of collateral and valuation

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

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

(a2) Should the variation margin be taken into account for the calculation of the mark to market value?

(b) Is the 180 day extension for reporting of collateral also valid for reporting of mark-to-market valuations? What will be the earliest deadline for the reporting date?

(c) 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?

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

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

TR Answer 3

(a) As specified in Article 3 of Commission Delegated Regulation (EU) No 148/2013 (RTS on reporting to TR), 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).

With reference to transactions cleared by a CCP, the fields on the contract valuation should be reported on a daily basis at position level, as maintained and valued by the CCP**.** 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.

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).

(a1) There is no such field for the moment given that reporting is performed at portfolio level. Field 22 on collateralisation refers to any collateral posted by a counterparty that covers/reduces the actual exposure and there is no field querying or rule limiting the type of collateral to be reported (without prejudice of rules on how to collateralise, or others outside the reporting section of EMIR and that may be applicable to certain counterparties).

(a2) No. It is not permissible to report zero in this field on the grounds that there is no market risk because variation margin has been paid. Any margin paid would be reflected in Counterparty Data field 25 and not in this field.

(b) The reporting start date is extended by 180 days for the reporting of information referred to in Article 3 of Regulation (EU) 148/2013, i.e. data on exposure. The corresponding fields in the table are the fields related to valuation and collateral (fields 17 to 26 of Table 1).

(c) By the end of the day following execution (reporting time limit) the contract and all its characteristics, including valuation, should be reported.

(d) Valuation update (V) in field No. 58 refers to any change in fields 17 to 26 of table 1. Therefore, changes in the amount of collateral should be reported as a (V) in field 58.

(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.

TR Question 4 [last update 4 June 2013]

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

(a) Article 5 of Commission Implementing Regulation (EU) No 1247/2012 (ITS on reporting to trade repositories) appears to require the reporting of every exchange-traded derivative contract entered into from 16 August 2012. Given that the ETD industry maintains positions at contract levels aggregated from daily transactions, would the provision of position level data be more practical, and more meaningful?

(b) Should information on valuation and collateral be reported for contracts entered into from 16 August 2012?

(c) Is an agreed Trade-ID also necessary for backloaded trades?

TR Answer 4

(a) The reporting obligation applies equally to OTC derivatives and ETDs. As such, as specified in Article 5(3-4) of Commission Implementing Regulation (EU) No 1247/2012 (ITS on TR reporting), ETDs which were still outstanding on 16 August 2012 will have to be reported within 90 days of the date of the reporting obligation coming into force if they are still outstanding on that date, and within 3 years of the date of the reporting obligation coming into force, if they are not. However, for reporting of those transactions, there is no need to report separately any life cycle events which occurred before the reporting date. The contract can be reported at position level in its final state or, for contracts which are still outstanding, its state at the time the report is submitted.

(b) As for sub-answer (a), OTC derivatives transactions that are still outstanding on the date when the reporting obligation comes into force will need to include the information on valuation and collateral as from the date of the reporting obligation and not for all the days from 16 August 2012 to the date of the application of the reporting obligation pursuant to Article 5 of 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 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories. Similarly contracts

that were terminated before the reporting obligation starts applying should not include the information on collateral and valuation..

(c) To the extent that a backloaded contract is still outstanding at the time of reporting, a Trade-ID needs to be agreed between the two counterparties and reported, together with the other information on that contract.

TR Question 5 [last update 4 June 2013]

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 (RTS on reporting to TR). 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 20 March 2013]

Article 9 of EMIR – Reporting to TRs – Cleared trades

What is the timeframe of reporting ETD transactions cleared by the CCP?

TR Answer 6

Where clearing takes place on the same day of execution, the report should be submitted once to a TR up to 1 working day after the execution, as provided under Article 9 EMIR.

In the rare cases where clearing takes place after the day of execution and after reporting is made, novation should be reported as an amendment to the original report up to 1 day after the clearing took place.

TR Question 7 [last update 4 June 2013]

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

(a) In order to avoid the duplication of reported details (according to Article 9(1) 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 [last update 4 June 2013]

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 reporting 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 5 August 2013]

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

(a) What is the difference in the two fields: Trade ID and Transaction Reference 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 yet for derivatives. The Trade ID is the key one for EMIR reporting (per contract). The transaction reference number was designed for MiFID reporting purposes and included in the EMIR reporting obligation so that reporting to TRs is also meaningful for MiFID purposes.

(b) to (e): Yes.

TR Question 10 [last update 22 October 2013] **– 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 a BIC, a LEI or interim LEI?

*(b) **modified** What code should be used to identify counterparties (LEIs, interim LEIs or BICs)?*

(c) Will the LEI cover branches or desks?

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

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

TR Answer 10

(a) Yes, where customers are individuals. For customers other than individuals see (b) on the ID of counterparties below.

(b) ***modified*** A pre-LEI issued by any of the endorsed pre-LOUs (Local Operating Units) of the Global Legal Entity Identifier System. The list of endorsed pre-LOUs is available at: http://www.leiroc.org/publications/gls/lou_20131003_2.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 is not expected to cover branches/desks, 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".

(d) 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. As it stands from EMIR technical standards on reporting:

a. If there is no endorsed UPI, the interim taxonomy and code contained in the standards should be used; and

b. If there is no endorsed UTI, a code should be bilaterally assigned by the counterparties and be assigned by the venue operator, in the case of platforms.

TR Question 11 [last update 5 August 2013]

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 "business day" be defined, when the counterparties to the same transaction follow different calendars?

(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) The time convention is defined in the ITS as UTC (Coordinated Universal Time). As regards the calendar the approach for ETDs is the schedule of the relevant market and for OTC the calendar agreed by the counterparties under their contract. Should there be no common agreement of calendar by the counterparties to an OTC contract, the TARGET calendar should be used[7], including by the EU counterparty reporting a contract with a non-EU counterparty.

(c) Yes.

TR Question 12 [last update 4 June 2013]

Maturity

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?

TR Answer 12

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.

TR Question 13 [last update 5 August 2013]
Intragroup transactions

Should intragroup transactions be reported?

TR Answer 13
Yes. There is no exemption for intragroup trades from the reporting obligation. They should be reported as any other trades and the corresponding field 32 "Intragroup" should be filled with the value "yes".

TR Question 14 [last update 5 August 2013]
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?

[7] Please refer to http://www.ecb.int/home/html/holidays.en.html

TR Answer 14
No, because they do not involve two counterparties.

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.

Part IV: Reporting to TRs – Transaction scenarios

Date last updated: 4 June 2013

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[8];

- 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;

- 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 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 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;

[8] (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).

- both counterparties delegate on a single third party;
- both counterparties delegate on two different third parties;

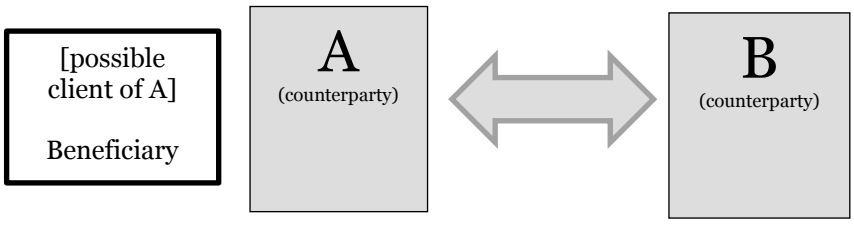
– all the examples below will be compatible with any of the possibilities above in case the two counterparties do not report directly: following the principle of avoiding duplication and ensuring reporting, ESMA is favourable to centralised reporting (i.e. by the venue in which a non-OTC has been concluded 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 (notably Article 2 on cleared trades).

Case 1: Bilateral, non-cleared trade (basic case)

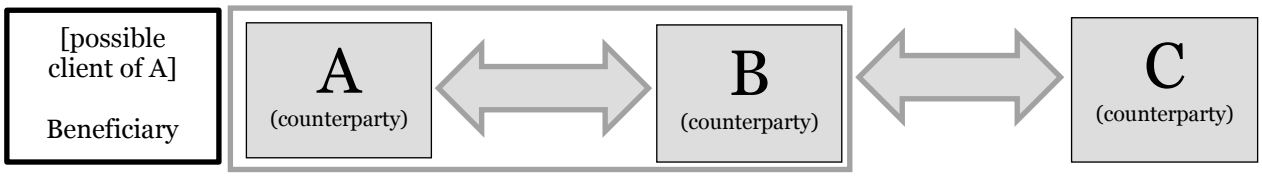


No specific provisions apply to this case. Both counterparties have an obligation to report.

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

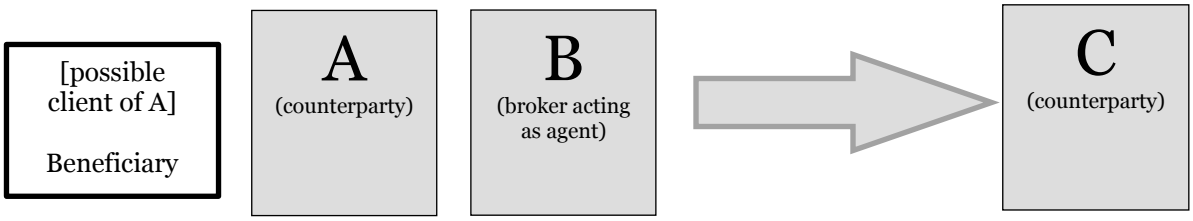


A is a client of B. They conclude a transaction that is back-to-back to another transaction that B is concluding with C.

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.