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)

24 October 2014 | ESMA/2014/1300

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 EMIR1 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, subsequent updates have been published on a regular basis. 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]

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

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.

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

[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.

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: 21 May 2014

General Question 1: Funds, counterparties [Last update: 21 May 2014]

(a) 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?

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

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

General Answer 1:

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

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

2. For the purpose of the reporting to TRs, the counterparty ID should be the ID of the fund, not the ID of the fund manager. 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.

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

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

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

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

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

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

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

General Answer 2:

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

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

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

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

What is the status of the following counterparties under EMIR?

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

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

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

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

General Answer 3

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

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

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

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

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

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

General Answer 4

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

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

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

Part I: OTC Derivatives

Last update: 21 May 2014

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 execution and the clearing by a CCP, should not be regarded as OTC derivatives transactions. Therefore, these transactions should not be considered for the purpose of the clearing obligation and the calculation of the clearing threshold by NFC that only relates to OTC derivatives.

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 21 May 2014]

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?*

(d) *When the notional amount of a derivative contract is subject to modifications which were already foreseen in the original contract specifications (e.g. a reduction/increase of the notional at fixed dates), should the updated notional amount be taken into account for the purpose of calculating the Clearing Threshold?*

(e) *When calculating the non-hedging positions in OTC derivatives to be compared to the values of the clearing threshold, are NFC allowed to take into account any netting effect?*

(f) *What should be the procedure for NFC that had notified the relevant competent authority and ESMA that they were above the clearing threshold on the basis of certain assumptions, but are in fact below the clearing threshold on the basis of amended and correct assumptions?*

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.

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

(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. The group to which the non-financial counterparty belongs includes subsidiaries, sisters and parent companies of the non-financial counterparty wherever the ultimate parent company is established.

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

(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.

(d) Yes, the updated notional amount should be taken into account for the purpose of calculating the Clearing Threshold.

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

(f) When the clearing threshold is not (and would not have been) exceeded if the NFC had applied from the beginning the correct assumptions for the calculation of the clearing threshold, the NFC should inform the competent authority and ESMA of this fact. The NFC will be regarded as a NFC- for past and future obligations.

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 21 May 2014]

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

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

(b) Is it necessary for the Commission to have adopted an implementing act (equivalence decision) under article 13(2) of EMIR in order for intragroup transactions between a counterparty

established in the Union, and a counterparty established in a third country to qualify as an intragroup transaction under Article 3 of EMIR?

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

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

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

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

OTC Answer 6

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

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

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

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

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

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

(c) There are two different processes for counterparties to benefit from the intragroup exemption from the clearing obligation, depending on whether the counterparty to the intragroup transactions is established in the Union (non-objection process described under Article 4(2)(a)) or in a

third country in respect of which the European Commission has adopted an implementing act under Article 13(2) (authorisation process described under Article 4(2)(b)). ESMA is currently working with competent authorities to harmonise the process at European level to the extent possible. Counterparties will need to submit their applications/notifications related to intragroup transactions exemption to their respective competent authorities, and not to ESMA.

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

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

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

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

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

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

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

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

OTC Question 7 [last update 21 May 2014]

Article 6 of EMIR: Public Register

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

OTC Answer 7

The Public register contains two types of information:

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

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

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

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

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

OTC Question 8 [last update 4 June 2013]

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

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

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

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

OTC Answer 8

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

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

OTC Question 9 [last update 20 March 2014]

Notional amounts

When calculating the positions in OTC derivatives to be compared to the clearing thresholds, NFCs shall use notional amounts, in line with OTC Q&A 3(e). How should the notional amounts be calculated 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 (in the case of options, this is not the premium). 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) The definition of hedging for EMIR purposes includes and is broader that the definition used in the IFRS accounting rules. Therefore OTC derivative contracts that qualify as hedging under the definition of the IFRS rules also qualify as hedging for EMIR purposes. Moreover, some OTC derivative contracts may qualify as hedging for EMIR purposes (which includes also proxy hedging and macro or portfolio hedging) although they do not qualify as hedging under the definition of the IFRS rules.

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

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

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

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

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

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

OTC Question 11 [last update 4 June 2013]

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

(a) When financial and non-financial counterparties conclude that a portfolio compression exercise is not appropriate, they need to be able to provide a "reasonable and valid explanation". What is considered as a "reasonable and valid explanation"?

(b) Does the requirement on portfolio compression prevent an offsetting transaction to be concluded with a counterparty different from the counterparty to the initial transaction?

OTC Answer 11

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

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

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

OTC Question 12 [last update 20 March 2014]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OTC Answer 12

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

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

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

(c) Non-financial counterparties below the clearing threshold are subject to the following risk-mitigation techniques:

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

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

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

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

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

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

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

(j) No, Article 11 of EMIR only applies to OTC derivative contracts not cleared by a CCP, irrespective of its status under EMIR. The conditions under which financial and non-financial counterparties can be serviced by third-country CCPs are generally addressed in Articles 25 and 89 of EMIR. This covers the transitional period during which financial and non-financial counterpar-

ties can be serviced by third-country CCPs that have applied for recognition before 15 September 2013, as well as after the transitional period when financial and non-financial counterparties can still access non recognised third-country CCPs as clients (via a third-country clearing member only) if they wish to clear products other than derivatives subject to a clearing obligation under EMIR. With regards to the clearing obligation, Article 4(3) clarifies that clearing with a third country CCP is only allowed when that CCP is recognised under Article 25, irrespective of the capacity in which EU-based counterparties access the CCP (as clearing members, clients or through indirect clearing arrangements).

OTC Question 13 [last update 10 July 2014]

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-?

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

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.

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

OTC Question 14 [last update 20 December 2013]

Portfolio Reconciliation – Article 13 of the RTS on OTC Derivatives

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

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

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

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

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

OTC Answer 14

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

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

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

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

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

1. 15 March 2014 (quarterly requirement) if the NFC- is still a NFC- on 15 December 2013, and if the number of its outstanding contracts with Counterparty X was above 100 at any time in the previous reconciliation period, i.e. from 15 September 2013 to 15 December 2013. This should be assessed on the reconciliation date, i.e. on 15 December 2013.
2. 15 December 2014 (yearly requirement) if the NFC- is still a NFC- on 15 December 2013, and if the number of its outstanding contracts with Counterparty X was below 100 at all time during the previous reconciliation period, i.e. from 15 September 2013 to 15 December 2013. This should be assessed on the reconciliation date, i.e. on 15 December 2013.

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

OTC Question 15 [last update 5 August 2013]

Dispute Resolution – Article 15 of the RTS on OTC Derivatives

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

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

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

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

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

OTC Answer 15

(a) Counterparties may agree upfront that discrepancies that amount to a value below a 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.

OTC Question 16 [last update 11 November 2013]

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

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

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

OTC Answer 16

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

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

OTC Question 17 [last update 20 December 2013]

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

The frontloading requirement as foreseen by Article 4(1)(b)(ii) of EMIR is the obligation to clear the OTC derivative contracts (pertaining to a class of OTC derivatives that has been declared subject to the clearing obligation) that are entered into after the notification as referred to in Article 5(1) and before the date of application of the clearing obligation. In case a CCP has been authorised to clear a certain class of OTC derivatives and after the notification to ESMA under Article 5(1) this class is not declared to be subject to the clearing obligation, what is the consequence for the frontloading under the following two cases:

(a) ESMA subsequently decides to subject that class to the clearing obligation.

(b) a second CCP is subsequently authorised to clear the same class of OTC derivatives and this class is then declared to be subject to the clearing obligation

OTC Answer 17

(a) In the event that a class of OTC derivatives has not been declared to be subject to the clearing obligation under the procedure described in Article 5(2), ESMA may still, on the basis of its initial empowerment, propose a clearing obligation on the same class of OTC derivatives at a later point in time, in order to take into account e.g. market developments.

Article 4(1)(b)(ii) (the frontloading requirement) is not applicable in this case, as the frontloading start date is determined by the date of the notification under Article 5(1) and that there is no such notification in this case.

(b) In the situation described in (b), the notification of the first CCP would have led ESMA not to include a certain class of OTC derivatives in the scope of the clearing obligation, while the notification of the second CCP would have led ESMA to include the same class in the scope of the clearing obligation. Hence the notification which triggers the inclusion of the class of OTC derivatives in the scope of the clearing obligation is the second notification. Therefore, the date of the second notification, i.e. the notification as referred to in Article 5(1) and sent to ESMA following the authorisation of the second CCP, should be the one to consider when applying Article 4(1)(b)(ii).

OTC Question 18 [last update 11 February 2014]

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

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

OTC Answer 18

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

OTC Question 19 [last update 21 May 2014]

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

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

OTC Answer 19

If a non-EU central bank is listed in Article 1(4) of EMIR (as amended by the European Commission from time to time pursuant to Article 1(6) of EMIR), it is exempt from EMIR. For the purpose of the clearing obligation and risk mitigation techniques other than exchange of collateral, if a non-EU central bank is not

listed in Article 1(4) of EMIR (as amended by the European Commission from time to time pursuant to Article 1(6) of EMIR), it is to be treated under EMIR as a third country entity that would be an NFC if it were established in the EU.

Part II: CCPs

Last update: 21 May 2014

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 im-

[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'.*

pose such a decline in full in respect of every financial instrument that is posted to the CCP at the expense of clients.

CCP Question 3 [last update 11 February 2014]

Article 48 of EMIR – Default management

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

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

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

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

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

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

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

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

CCP Answer 3

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

Following a member default, a CCP is required to transfer the assets and positions recorded as being held for the account of the clients of the defaulted clearing member if the conditions defined in Article 48 are met. Otherwise, the CCP may try to transfer the assets and positions, on a best effort basis, but ultimately has the right to liquidate the assets and positions. If the assets of a client of the defaulted clearing members are only partially liquidated then the non-

liquidated portion of the assets will be returned to the clients when they are known to the CCP or, if they are not, to the clearing member for the account of its clients.

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

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

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

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 reflect-

ed at the level of the security settlement system or alternative highly secured arrangements with authorised financial institutions.

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

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

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

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

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

CCP Question 5 [last update 20 March 2013]

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

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

(b) Model validation for authorisation purposes: Is it compulsory for a CCP to conduct a comprehensive validation of models, methodologies and risk management framework before getting

authorisation, in accordance with to Article 47 Model Validation (of the Commission delegated Regulation (EU) No 153/2013 of 19.12.2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 with regard to regulatory technical standards developed by ESMA on requirements for central counterparties)?

CCP Answer 5

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

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

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

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

CCP Question 6 [last update 11 February 2014]

Article 14 of EMIR – Authorisation of a CCP:

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

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

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

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

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

CCP Answer 6

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

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

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

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

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

(d) Article 14(3) of EMIR provides that an authorisation decision under Article 14(1) shall specify the services or activities which a CCP is authorised to provide or perform. Article 14(3) also provides that an authorisation decision under Article 14(1) shall be granted only for activities

linked to clearing. Article 2(3) of EMIR defines 'clearing' as the process of establishing positions (including the calculation of net obligations) and ensuring that financial instruments, cash, or both, are available to secure the exposures arising from those positions.

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

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

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

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

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

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

CCP Question 7 [last update 4 June 2013]

Article 16 of EMIR – Capital:

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

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

CCP Answer 7

Under CRD, the classification of an investment asset under the banking or trading book depends on whether the bank has a trading intent with reference to that asset; positions held with a trading intent are those held intentionally for short-term resale and/or with the intention of benefiting from actual expected

short-term price differences between buying and selling prices or from other price or interest rate variations.

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

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

CCP Question 8 [last update 10 July 2014]

Article 39 of EMIR – Segregation and portability:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CCP Answer 8

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

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

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

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

The two conditions above should be supported by appropriate documentation.

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

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

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

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

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

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

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

(f)(1) The objective of the provisions in Article 39 of EMIR is to ensure that clients of clearing members are granted a high level of protection[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

[5] *See Recital 64 of EMIR.*

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

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

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

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

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

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

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

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

(l) It is the responsibility of the clearing member to inform the CCP of the account to which positions and assets held by the clearing member should be allocated. The contractual arrangement between a clearing member and its client may provide for the positions and assets held

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

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

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

CCP Question 9 [last update 4 June 2013]

Article 41 of EMIR – Margin requirements:

(a) Under a cross-margining arrangement, two (or potentially more) CCPs set margin requirements on the basis of the portfolio of positions that a clearing member holds across the two CCPs. Is this approach consistent with the requirements of EMIR and the associated Commission Delegated Regulations?

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

(c) 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 mar-

gins 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]

Article 14 of EMIR – Outsourcing:

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

CCP Answer 10

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

CCP Question 11 [last update 11 February 2014]

Article 47 of EMIR – Investment Policy:

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

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

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

CCP Answer 11

(a) *Article 45(2) of Commission Delegated Regulation (EU) No 153/2013 (RTS on CCP require*ments) provides that where cash is deposited other than with a central bank in accordance with Article 47(4), and is maintained overnight, then not less than 95% of such cash must be depos-

ited through arrangements that ensure the collateralisation of the cash with highly liquid financial instruments meeting the requirements in Article 43 of the same Regulation, for example, through repo transactions.

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

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

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

Given that the cash will always be deposited with an entity meeting the criteria under Article 45(1) of Commission Delegated Regulation (EU) No 153/2013, and collateralised with financial instruments meeting the requirements under Article 44 of Commission Delegated Regulation (EU) No 153/2013, then the CCP will not be exposed to principal risk with regards to the counterparty with which the CCP has collateralised its cash.

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

CCP Question 12 [last update 11 February 2014]

Article 42 of EMIR – Default Fund:

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

(b) Article 30 of Commission Delegated Regulation (EU) No 153/2013 requires that "when implementing an internal policy framework for defining the types of extreme but plausible market conditions that could expose the CCP to greatest risk, a CCP shall specify (for each market to

which a CCP is exposed in a clearing member default scenario) extreme but plausible conditions based at least on… (a) a range of historical scenarios… that would have exposed the CCP to greatest financial risk; and (b) a range of potential future scenarios… drawing on both quantitative and qualitative assessments of potential market conditions".

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

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

CCP Answer 12:

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

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

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

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

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

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

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

CCP Question 13 [last update 21 May 2014]

Article 26 of EMIR – Organisational requirements:

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

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

CCP Answer 13

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

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

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

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

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

CCP Question 14 [last update 5 August 2013]

Article 2 of EMIR – Definitions:

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

CCP Answer 14:

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

Article 3(4) of the RTS on CCPs also requires that "a CCP that is part of a group shall take into account any implications of the group for its own governance arrangements including whether it has the necessary level of independence to meet its regulatory obligations as a distinct legal person and whether its independence could be compromised by the group structure 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?

CCP Answer 15

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

only against defaults arising in the market segments to which that default fund refers, and not against defaults arising in market segments to which other default funds refer. Any amount of dedicated own resources contributed to the default waterfall in excess of this minimum amount does not need to be allocated to a specific default fund and may be allocated across the different default funds and in a different proportion to the minimum amount.

CCP Question 16 [last update 11 February 2014]

Article 38 of EMIR – Transparency

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

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

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

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

CCP Answer 16

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

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

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

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

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

CCP Question 17 [last update 11 February 2014]

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

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

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

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

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

CCP Answer 17

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

1. It is compatible with EMIR for a CCP to have provisions in its rules under which non-defaulting clearing members can be called for additional funds in the event of the default of another clearing member and where the size of the additional contribution is limited to a pre-defined mone-

tary amount. In particular the losses to which non-defaulting clearing members are exposed are pre-defined and such losses can be controlled to the extent that the clearing member can reduce the exposure that it has to the CCP. Such exposures are therefore limited on the basis that they can both be anticipated and controlled.

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

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

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

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

CCP Question 18 [last update 11 February 2014]

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

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

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

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

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

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

CCP Answer 18

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

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

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

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

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

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

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

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

b) EMIR provides that a CCP shall not use the margins posted by non-defaulting clearing members to cover losses resulting from the default of another clearing member (Article 45(4) of EMIR). However, the reuse of margins posted by a non-defaulting clearing member to cover a liquidity shortfall resulting from the default of a clearing member (e.g. the CCP using financial

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

CCP Question 19 [last update 11 February 2014]

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

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

CCP Answer 19

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

CCP Question 20 [last update 21 May 2014]

Article 28 of EMIR – Risk Committee

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

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

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

CCP Answer 20

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

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

CCP Question 21 [last update 21 May 2014]

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

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

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

CCP Answer 21

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

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

Part III: Trade repositories

Last update: 23 June 2014

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.

TR Question 3a [last update 23 June 2014]

Article 9 of EMIR – Reporting of collateral

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

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

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

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

(a4) What forms of collateral should be included?

(a5) How should counterparties report the collateral amount where the collateral agreement allows the covering of exposures in transactions that are not to be reported under EMIR?

[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.

(a6) When should collateral be reported for types of collateral (such as securities) where settlement of the movement could take place after the collateral movement was initiated?

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

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

TR Answer 3a

(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).

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

(a1) 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) There is only one collateral value field (Table 1, Field 25) and an associated currency field (Table 1, Field 26) on a report by a Counterparty. Therefore all collateral for a single portfolio should be reported in one single currency value. The reporting counterparty is free to decide which currency should be used as base currency as long as the base currency chosen is one of the major currencies which represents the greatest weight in the pool and is used consistently for the purpose of collateral reporting for a given portfolio.

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

(a4) Consistent with TR Answer 3b (a1) below, the collateral should be the sum of any initial margin (or similar) posted by the reporting counterparty and any variation margin (or similar) also posted by the reporting counterparty. Note that there is no obligation to report collateral received (to avoid double-counting) and therefore if the variation margin is flowing in the opposite direction to the initial margin, it would be the other counterparty that would have to report the variation margin on their report.

(a5) the collateral reported should be just the collateral that covers the exposure related to the reports made under EMIR. If it is impossible to distinguish within a pool of collateral the amount which relates to derivatives reportable under EMIR from the amount which relates to other transactions the collateral reported can be the actual collateral posted covering a wider set of transactions.

(a6) the collateral should be reported as the total market value that has been posted by the counterparty responsible for the report. The fact that certain types of collateral might take a couple of days to reach the other counterparty should be ignored.

(b) 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). The resulting date is therefore 11 August 2014 with the first reports being due no later than the end of 12 August 2014 including the valuations and collateral as at the end of 11 August 2014.

(c) 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.

TR Question 3b [last update 23 June 2014]

Article 9 of EMIR – Reporting valuations

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

(a1) Should the variation margin be taken into account for the calculation of the mark to market value?

(a2) which *price should be considered for the purpose of calculating the mark-to-market value of contract to be reported in Table 1, Field 17?*

(a3) How should the mark to market value be calculated?

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

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

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

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

TR Answer 3b:

(a) With reference to transactions cleared by a CCP, the fields on the contract valuation should be reported on a daily basis at position level, as maintained and valued by the CCP in accordance with Article 3 (5) of Commission Delegated Regulation (EU) No 148/2013. 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) No. It is not permissible to report zero in the field 17, table 1 exclusively 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.

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

(a3) The mark to market value should represent the absolute value of the contract.

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

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

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

(e) Since the valuation is part of the Counterparty data, in the case of a derivative not cleared by a CCP, counterparties do not need to agree on the valuation reported.

TR Question 4 [last update 24 October 2014]

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?

(d) What should the procedure be where financial counterparties and CCPs that should report their contracts within 90 days or 3 years are no longer authorised, they change their corporate purpose or if they are liquidated within the backloading period?

(e) ***new**** *Are third country entities (not subject to the reporting obligation when it came into force on 12 February), that have subsequently become financial counterparties in the EU (due to re-location or because they are managed by an AIFM which becomes authorised or registered under AIFMD), required to report trades that were entered into before they became subject to EMIR?*

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. For all reportable contracts concluded before the reporting start date 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. For centrally cleared contracts concluded before 16 August 2012 or between 16 August 2012 and 11 February 2014 counterparties are expected to report only their resulting net position at the CCP level as of the end of 11 February 2014.

(b) OTC derivatives transactions that are still outstanding on the date when the reporting obligation for this information comes into force (i.e. 180 days after the reporting start date) 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.

(d) Any undertaking assuming the obligations of a liquidated or insolvent undertaking (e.g. merger by incorporation or similar) should ensure EMIR reporting of the contracts it entered into via that transfer. The identifier (LEI) to be used should be the one of the undertaking assuming the obligations of a liquidated or insolvent undertaking.

If no undertaking is assuming the obligations of the liquidated or insolvent undertaking, the relevant derivative contracts would be reported as terminated contracts only by the counterparty of the liquidated undertaking (if subject to EMIR). In this case the counterparty of the liquidated undertaking will use a BIC or client code, if the liquidated undertaking did not have an LEI.

(e) ****new**** Yes. When a counterparty to a derivative contract that is outstanding establishes itself in the EU it becomes subject to the reporting obligation. This applies to all outstanding contracts, so that such counterparty's risks are known in the EU where that entity is now based. Non-reporting of those outstanding contracts would represent hidden risk that would be contrary to the EMIR / G20 reform objectives.

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 20 December 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. In particular case of reporting the ETD contracts please see Answer 5 in Part V: ETDs Reporting.

(b) to (e): Yes.

TR Question 10 – Codes [last update 24 October 2014]

LEI (Legal Entity Identifier)

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

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

(c) Will the LEI cover branches or desks?

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

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

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

TR Answer 10

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

(b) ****modified**** An LEI issued by, and duly renewed and maintained according to the terms of, 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) Article 9(5) EMIR provides that at least the identities of the parties to the derivative contracts should be reported to trade repositories. This requirement cannot be waived. Therefore, a European counterparty dealing with counterparties that cannot be identified because of legal, regulatory or contractual impediments, would not be deemed compliant with Article 9(5) of EMIR.

(e) ****modified**** 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, the confirmation platform or the CCP as prescribed in the TR Q&A 19.

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.

TR Question 16 [last update 20 December 2013]

Collateral portfolio code

How should the Collateral portfolio code be populated?

TR Answer 16

It is up to the Counterparty making the report to determine what unique value to put in the Collateral portfolio code (Table 1 Field 24). This field should only be populated if the Collateral portfolio (Table 1 Field 23) has the value 'Y'.

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

TR Question 17 [last update 20 December 2013]

Position level reporting

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

TR Answer 17

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

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

2. The original trades, i.e. at transaction level, have been correctly reported. It is not permissible to report only positions. All contracts concluded on or after 12 February 2014 must be reported at the transaction level in all cases, starting 12 February 2014.

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

4. The original trade reports (point 2 above) and reports relating to other events (point 3 above), where applicable, have reached a suitable “end of life state". This should be achieved by marking the original trades/event reports as compressed (i.e. putting the value 'Z' into the Action type (Table 2 Field 58) via a modification) and then reporting the resulting net position (either as a new position or as an update to an existing position) marked as being the result of a compression (i.e. with the value ‘Y’ in the Compression field (Table 2 Field 11)).

5. The report of the position is made correctly filling in all the applicable fields in Tables 1 and 2.

6. The applicable Trade Repository is capable of receiving reports at position level as described above and is also capable of providing both trade and position level data to authorities in a consistent way as defined by ESMA.

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

TR Question 18 [last update 11 February 2014]

Article 9 of EMIR – Reporting to TRs: UTI construction

How to construct a Unique Trade ID?

TR Answer 18

Commission Delegated Regulation (EU) No 148/2013 specifies that in the absence of a Trade ID agreed at the European Level, a unique code should be generated and agreed with the other counterparty (Table 2, field 8). This means that only one Trade ID should be applicable to any one derivative contract that is reported to a trade repository under EMIR and that the same Trade ID is not used for any other derivative contract. It is also acknowledged that contracts reported under EMIR rules might also reported under the rules of other jurisdictions. Hence, the same Trade ID should be allowed to be used in both those jurisdictions for reporting the given contract in order to facilitate the reconciliation among all the data sets.

Commission Implementing Regulation (EU) No 1247/2012 specifies that the Trade ID can have up to 52 characters. Therefore a Trade ID that is less than 52 characters in length is permissible provided that it meets the other criteria laid out here. There is no requirement to pad out Trade ID values to make them 52 characters long.

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

Method 1:

a. The characters 'E01'. The characters '000' will also be permitted but only for derivative contracts executed before 12 February 2015.

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

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

Method 2:

a. The characters 'E02'.

b. The (20 character) Legal Entity Identifier of the generating entity (normally one of the parties to the trade).

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

Method 3:

a. The characters 'E03'.

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

Method 4: Note that ESMA considers this approach as sub-optimal and therefore intends to maintain it as a possibility only for derivative contracts that have been or will be entered into before 12 February 2015:

a. The characters 'E04' or '000'.

b. An identifier of the generating entity other than the full Legal Entity Identifier (normally one of the parties to the trade).

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

For derivative contracts that are also reportable under the provisions of the Dodd-Frank Act the same value as would be reported under the Dodd-Frank Act, i.e. the Unique Swap Identifier[8], could be used.

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

****modified** TR Question 19** [last update 24 October 2014]

Article 9 of EMIR – Reporting to TRs: UTI generation

What criteria should be applied by the two counterparties to determine the one that would generate the Unique Trade ID (hereafter UTI)?

TR Answer 19

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

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

and in recital (2) of the Commission Delegated Regulation (EU) No 148/2013. On this basis, the latter Regulation states the general rule which applies in the absence of a UTI agreed at the European Level. According to this rule the UTI must be agreed with the other counterparty (see Table 2, field 8 of the Regulation). The generation and communication of the UTI should occur at the earliest possible stage in the trade flow.

Should counterparties fail to agree on the responsibility to generate a UTI, the following approach to UTI generation should be followed:

- For centrally executed and cleared trades the code should be generated either:
    - by execution venue for its member or
    - at the point of clearing by the CCP for the clearing member. Subsequently, the UTI should be generated by the clearing member for its counterparty (e.g. MiFID investment firm).
- For centrally confirmed and cleared trades - at the point of clearing by the CCP for the clearing member.
- For centrally confirmed but not cleared trades – at the point of confirmation (by the confirmation platform).

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

- For other trades, the following hierarchy should be followed:
    - Financial counterparty generating the UTI for their non-financial counterparty;
    - Non-financial counterparty above the clearing threshold generating the UTI for their non-financial counterparty below the clearing threshold;
    - Within the same group of entities in case of disagreement the seller generates the UTI.

modified **TR Question 20** [last update 24 October 2014]

Article 9 of EMIR – Reporting to TRs: Empty fields

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

TR Answer 20

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

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

2. The field is **relevant** for a given type of contract/trade, however:
    a. there is a legitimate reason why the actual value of this field is not being provided at the time the report is being submitted, or
    b. none of the possible values provided for in the Annex of the Commission Implementing Regulation (EU) 1247/2012 for a given field apply to the specific trade (e.g. in the case of report submitted by the CCP, field No 7 in the Table 1 Counterparty Data).

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

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

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

TRs should apply validation rules to ensure that reporting is performed according to the EMIR regime, including the specifications of the Technical Standards. Accordingly, reporting counterparties or submitting entities should comply with the reporting requirements specified in the Validation table which can be found on ESMA's website. This includes the possible NA/Blank values of certain fields. In order to be compliant with the requirements of Article 19 of the Commission Delegated Regulation (EU) 150/2013, TRs should reject the reports which are not submitted in line with the reporting requirements specified in this Validation table.

TR Question 21 [last update 11 February 2014]

Article 9 of EMIR – Reporting to TRs: UPI taxonomy

In the absence of a Unique Product Identifier taxonomy endorsed in Europe what identifiers should be used for derivative contracts for which neither ISIN nor AII codes are available?

TR Answer 21

According to Article 4(3) of the Commission Implementing Regulation (EU) No 1247/2012 in cases where a unique product identifier does not exist and a derivative contract cannot be identified by using the combination of ISIN or AII with the corresponding CFI code, the type of derivative contract shall be identified through the Interim taxonomy on the following basis:

1. The derivative class (field No 2 in the Table 2 Common data) shall be identified as one of the following:
    a. commodities;
    b. credit;
    c. foreign exchange;
    d. equity;
    e. interest rate;
    f. other.

2. The derivative type (field No 3 in the Table 2 Common data) shall be identified as one of the following:
    a. contract for difference;
    b. forward rate agreement;
    c. forwards;
    d. futures;
    e. options;
    f. swaps;
    g. other.

3. In case of derivative contracts not falling into a specific derivative class or type, the report shall be made on the basis of the derivative class or derivative type that the counterparties agree the derivative contract most closely resembles.

4. In the absence of UPI taxonomy endorsed in Europe, no other taxonomy, classification or code should be used to populate these fields (i.e. Fields No 2 and 3 in the Table 2 Common data). If the Trade Repository offers a proprietary classification or taxonomy it could be used to populate other additional fields provided for by the given Trade Repository but it should not be used for population Fields No 2 and 3 referred to above.

TR Question 22 [last update 11 February 2014]

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

How to determine whether a particular contract has to be identified by the ISIN code or by the AII codes?

TR Answer 22

Derivative contracts traded on trading venues in the European Union and classified as the AII venues should be identified by the combination of the AII and CFI codes. The full list of such regulated markets (flagged as the AII venues in the 'Instrument Identifier' column) can be found in the MiFID Data Base (in the 'Regulated Markets' section) published on the ESMA website: http://mifiddatabase.esma.europa.eu/Index.aspx?sectionlinks_id=23&language=0&pageName=REGULATED_MARKETS_Display&subsection_id=0. Note that only the AII and CFI codes should be used for AII venues to ensure consistent reporting. For options and futures traded on MTFs the involved MTF should be consulted.

Derivative contracts traded on any other venues should be identified either by the ISIN code if available or, where ISIN code is not available, the Interim taxonomy as specified in Article 4(3) of the Commission Implementing Regulation (EU) No 1247/2012.

TR Question 23 [last update 11 February 2014]

Article 9 of EMIR – Reporting to TRs: AII code

How to populate field No 2 (Product ID 1) in the Table 2 Common Data for the AII derivative contracts?

TR Answer 23

Field No 2 should be populated with the Exchange Product Code assigned by the Regulated Market. At the same time field No 10 (Venue of execution) in the Table 2 Common Data should be populated with the MIC code of the venue of execution and not with 'XOFF' or 'XXXX'.

TR Question 24 [last update 24 October 2014]

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

a) *How should the field No 13 (Counterparty side) in the Table 1 Counterparty data be populated for the Equity, Debt and Dividend swaps?*

b) *****modified***** *Who is the 'buyer' and who is the 'seller' on an FX forward or an FX swap where the two counterparties are exchanging currencies, and are therefore both a buyer and seller at the same time?*

TR Answer 24

a) As a general principal, the buyer of the Equity Swap should be the Fixed Rate Payer (the buyer is the one who receives the equity performance).

   In case of Equity Swap – the buyer of the Equity Swap is the one who gets the risk of the price movement of the underlying (the Fixed Rate Payer and Equity Amount Receiver). So the seller is the Equity Amount Payer and Fixed Rate Receiver

In case of the Equity Swap with two equity legs – the buyer of the Equity Swap is the one who gets the risk of the price movement of the underlying.

In case of Debt Swap – the buyer of the Debt Swap is the one who gets the risk of the price movement of the bond. So the seller is the Bond Performance Amount Payer and Fixed Rate Receiver.

In case of Dividend swap – the buyer of the Dividend Swap is the one who receives the equivalent actual dividend payments, so the seller is the Dividend Payer and Fixed Rate Receiver

b) ****modified**** The counterparty that is delivering the currency which is first when sorted alphabetically by ISO 4217 standard should be identified as the 'seller' and populate the 'S' value in field 13 of the Table 1 Counterparty Data.

The following examples illustrate how the rule will apply in both the case of FX forward and FX SWAP:

i. **FX FORWARD**: A 1 month FX forward USD / JPY in 1.000.000 USD and forward rate 103 should be reported as follows by the different parties:

Counterparty A who will (in a month time) receive the USD and deliver the JPY
Counterparty B who will (in a month time) receive the JPY and deliver the USD
Then, according to rule:
First Currency sorted in alphabetical order: JPY (seller)
Second Currency sorted in alphabetical order: USD (buyer)

Deliverable currency – JPY (since J comes alphabetically before the U)
Currency 2 – USD
Notional Currency 1 – USD (according to contract)
Notional Currency 2- JPY
Notional amount – 1.000.000 (USD)
Seller: Counterparty A, since he delivers the Deliverable currency
Buyer: Counterparty B

ii. **FX SWAP**: A 1 year FX swap USD / JPY in 1.000.000 USD with spot rate 102 and forward rate 103
Counterparty A who will (in a year time) receive the USD and deliver the JPY
Counterparty B who will (in a year time) receive the JPY and deliver the USD

Counterparty A has to report as a SELLER of the FX swap (since it delivers Currency 1)
Counterparty B has to report as a BUYER of the FX swap

TR Question 25 [last update 11 February 2014]

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

Are decimal values allowed in the fields No 15 (Price multiplier) and 16 (Quantity) in the Table 2 Common data?

TR Answer 25

Yes, the specified format of up to 10 numerical digits should be understood as also allowing for the decimal values.

TR Question 26 [last update 11 February 2014]

Article 9 of EMIR – Reporting to TRs: Complex Contracts

How the following cases should be reported:

a) *A contract stemming from another contract (e.g. option on a future)*

b) *Trading strategies (e.g. Straddle or butterfly trades)*

c) *A transaction with 2 legs*

TR Answer 26

a) If the first contract ceases to exist before giving rise to the second one which is materially different from the first one, the two contracts should be reported separately. Therefore, even though the two contracts are connected in the way they come into existence, they should be reported in two separate reports.

b) The two (or more) derivative contracts related to the same trading strategies should be reported separately.

c) Both legs of the contract should be reported in one report, where the combination of fields in the Annex of the Commission Delegated Regulation (EU) No 148/2013 provides for this. Otherwise, a report per leg should be submitted.

TR Question 27 [last update 11 February 2014]

Article 9 of EMIR – 'Leg 1' and 'Leg 2' fields

Which leg of the transaction should be assigned to the 'Leg 1' field and which one to the "Leg 2"?

TR Answer 27

As these fields are included in the Table 2 as Common data, counterparties are expected to agree a consistent approach to assigning each leg to the respective field in the report. Lack of agreement would lead to reconciliation problems at the TR level.

The obligation to agree the reports content stems from the requirement of Article 9(1) of EMIR, 'counterparties and CCPs shall ensure that the details of their derivative contracts are reported without duplication' and is specified in the European Commission's Frequently Asked Questions document Section II Question 5: http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/emir-faqs_en.pdf

TR Question 28 [last update 20 March 2014]

Article 9 of EMIR – Underlying field

a) *How to populate Table 2 Field 4 (Underlying) for a commodity derivative contract where the underlying is not an index or a basket?*

b) *How to populate Table 2 Field 4 (Underlying) for FX derivative contracts that are not based on an index or a basket? For example when the underlying is a currency (foreign exchange rate).*

TR Answer 28

a) In the absence of an endorsed UPI, the underlying commodity must be indicated in Section 2g in fields 45 and 46 under the commodity base and commodity details fields respectively. The Underlying field (Table 2, Field 4) cannot be completed in this case and should be populated with an 'NA' value.
b) In the absence of an endorsed UPI, the underlying currency must be indicated under the notional currency fields 5 and 6 and populating the relevant section 2f. The Underlying field (Table 2 Field 4) cannot be completed in this case and should be populated with an 'NA' value.

TR Question 29 [last update 20 March 2014]

Article 9 of EMIR – Field 15 for NFC

Are NFCs required to complete Field 15 in Table 1 of the reporting RTS (purpose of the trade) when reporting an exchange traded derivative?

TR Answer 29

Field 15 should be completed when reporting either exchange traded or OTC derivative contracts to indicate whether the trade is directly linked to commercial activity or treasury financing. The reference to article 10(3) of EMIR in Table 1 is to ensure consistency with the concepts of commercial activity and treasury financing in article 10 of EMIR, but does not restrict field 15 to OTCDs.

TR Question 30 [last update 20 March 2014]

Article 9 of EMIR – MIC codes

When completing the Venue of execution field (Table 2, field 10) with a MIC Code, which type of MIC Code should be used?

TR Answer 30

MIC Codes are defined by ISO 10383. This standard identifies two sorts of MIC Code: 'MIC' and 'Operating MIC', also known as 'Segment MIC' and 'Organisation MIC' respectively. For EMIR reports Regulated Markets and MTFs should be identified by the relevant MIC Code as defined in the MiFID Database at http://mifiddatabase.esma.europa.eu/.

TR Question 31 [last update 20 March 2014]

Article 9 of EMIR – Exchange rate

In the fields referring to the exchange rate (42, 43, and 44) which rate should be put in the corresponding fields (execution rate/ reference rate for the day of report /other)?

TR Answer 31

Fields referring to the exchange rate should be populated with the rate applicable on the date of the conclusion of the contract, i.e. the rate applicable on the date indicated in the field 19 of the Table 2 Common Data. The rate should correspond with field 44 of Table 2, i.e. "Exchange rate basis".

TR Question 32 [last update 23 June 2014]

Article 9 of EMIR – reporting valuations of swaps on structured products

How should counterparties report valuations relating to complex contracts related to the same trading strategy?

TR Answer 32

Where the contracts pertaining to the same strategy have been reported separately according to Q&A TR 26, the valuation should be reported on a per contract basis.

TR Question 33 [last update 23 June 2014]

Article 9 of EMIR – Collateralisation field

How should the collateralisation field (Table 1, field 22) be populated?

TR Answer 33

(1) ''Uncollateralised''— A derivative contract shall be described as ''Uncollateralised'' when the reporting counterparty to such derivative contract is not posting any collateral (neither initial margin nor variation margin) at any time.

(2) ''Partially Collateralised''— A derivative contract shall be described as ''Partially Collateralised'' when the agreement between the counterparties states that either one or both counterparties will regularly post variation margin and either they do not exchange initial margin at all or only the reporting counterparty receives initial margin.

(3) ''One-way Collateralised''— A derivative contract shall be described as ''One-way Collateralised'' when the agreement between the counterparties states that only the reporting counterparty to such derivative contract agrees to post initial margin, regularly post variation margin or both with respect to the derivative contract.

(4) ''Fully Collateralised''— A derivative contract shall be described as ''Fully Collateralised'' when the agreement between the counterparties states that initial margin must be posted and variation margin must regularly be posted by both counterparties.

The word ‘‘regularly’’ is used above to exclude situations where the counterparties may set a threshold amount(s) that is so high that one or both counterparties will rarely post variation margin, if at all.

The implications of this approach are summarised in the table below.

	Value to be reported in the collateralisation field on their respective reports	
	Counterparty 1	**Counterparty 2**
VM posted by Counterparty 1 but not by Counterparty 2, no IM	PC	U
VM posted by both counterparties, no IM	PC	PC
IM + VM posted by Counterparty 1, nothing posted by Counterparty 2	OC	U
IM posted by Counterparty 1 only, both counterparties post VM	OC	PC
IM + VM posted by both counterparties	FC	FC
No collateral posted by either counterparty	U	U

TR Question 34 [last update 23 June 2014]

Article 9 of EMIR – Contracts with no maturity date

Some derivative contracts, like Contracts For Difference (CFDs), may not have any specified maturity date and at the moment of their conclusion the termination date is also not specified. Counterparties may at any moment decide to close the contract, with immediate effect. They can also close it partially as counterparties may terminate only a part of the volume on one day and the other part or parts of the contract on any other day. How should these contracts be reported under EMIR?

TR Answer 34

Each opening of a new contract should be reported by the counterparties to the TR as a new entry. Once the contract is closed, the counterparty should send a termination report to the initial entry, completing the field “Termination date”. If the contract is closed partially, counterparties send a modification report to the initial entry, reducing only its “Notional amount” (remaining volume is equal to the not yet terminated volume). If there is another partial close, yet another modification report is sent – until the contract is finally closed in whole. Then, the counterparties send a termination report marked as ‘cancelled’, completing the field “Termination date”. In these cases, the opening price of the contract is reported only in the first report (new) and it is not updated in the following modification reports.

TR Question 35 [last update 23 June 2014]

Article 9 of EMIR – Notional amount field

The RTS on the minimum details of the data to be reported to trade repositories indicates in field 14 that the notional amount field should represent the "original value of the contract". However, trades are regularly terminated or novated in part or increased or decreased. Therefore, the current notional might be substantially different from the original one as its value will reflect updates to the trade resulting from lifecycle events, e.g. Partial Terminations. Which type of values is the notional amount field intended to capture?

TR Answer 35

When an opening of a new contract occurs, the notional amount field represents the "original value of the contract". When the nominal value is increased or decreased as result of lifecycle events, counterparties send a *modification* report to the initial entry, modifying the quantity and/or the "Notional amount" accordingly to reflect the remaining volume. If the quantity changes then the "Notional amount" should be updated accordingly.

TR Question 36 [last update 23 June 2014]

Article 9 of EMIR – OTC Derivatives Novations

How should counterparties report OTC derivatives novations from the point of view of the remaining party? Assumption: For the exiting party, the existing transaction terminates, whilst for the entering party, a new transaction shall arise.

TR Answer 36

For the original report relating to the existing transaction, counterparties should send a *termination* report marked as 'cancelled', completing the field "Termination date". The remaining counterparty and the new counterparty should then send a new report relating to the new transaction.

****new**** **TR Question 37** [last update 24 October 2014]

Article 81 - Access to data by the competent authorities

According to Article 81(2) EMIR, "A trade repository shall collect and maintain data and shall ensure that the entities referred to in paragraph 3 have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates". Furthermore, Article 2 of Commission Delegated Regulation 151/2013 defines the different filtering criteria for the access to the three levels of data: transaction, position and aggregate.

a) *When referring to access to data by regulators, how "access to all transaction data" needs to be understood?*

b) *Does a Union competent authority (including the competent authorities of the EU Member States) have access to all transaction data on all derivatives trades concluded by a counterparty that fall within the scope of that authority, whether such counterparty is reported under counterparty data field no. 2 (Counterparty ID) or counterparty data field no. 3 (ID of the other counterparty)?*

c) *Does a competent authority from a Member state have access to all transaction data on all derivatives trades concluded by a counterparty that is from the same Member State?*

d) *Until the adoption of a unique product identifier in the European Union, the reports made to the trade repository in which the underlying is an index or a basket of indices are reported with an "I"*

or "B" in common data field 4. Which competent authorities have access to the all transaction data of the derivatives trades where the underlying is identified with an "I" or a "B"?

TR Answer 37

a) As described in Recital 13 of the Commission Delegated Regulation 151/2013, of 19 December 2012, transaction data should include individual trade details. These details include the two sets of counterparty data set out in Table 1 of the Annex of Commission delegated regulation 148/2013, of 19 of December 2012, and the common data set out set out in Table 2 of the Annex of Commission delegated regulation 148/2013, of 19 of December 2012.

b) Yes.

c) Yes, as long as it is entitled to it.

d) Until unique product identifier is adopted in the European Union, all Union competent authorities (including the competent authorities of the EU Member States) have access to all transaction data on derivatives trades where the underlying is identified with an "I" or a "B".

****New** TR Question 38** [last update 24 October 2014]

Trades terminated before reporting deadline

How should trades, which are terminated before the reporting deadline, be reported?

TR Answer 38

All contracts reported for the first time should be submitted as 'NEW'. If an early termination occurs before the reporting deadline, two simultaneous reports should be submitted: one with Action type NEW and one with action type CANCEL.

****New** TR Question 39** [last update 24 October 2014]

Block trades and allocations

How should block trades and allocations be reported?

TR Answer 39

There is a distinction necessary between (i) scenarios where the block trade was concluded by an investment firm and then allocated to clients and (ii) those scenarios where the block trade was concluded by a fund manager without own reporting obligation and then allocated to individual funds.

(i) In the first case the block trade should first be reported by the investment firm. The investment firm should then report the allocations to the individual clients.

(ii) In the second case, in accordance with General Question 1 (a), block trades that are subsequently allocated to individual funds on trade date are not required to be reported. In such cases, the counterparty to the derivative transaction is the individual fund, therefore the allocations should be reported (a) specifying the relevant individual fund (on behalf of which the fund manager has en-

tered into the block trade) as counterparty to the said trade and (b) specifying the allocation of the relevant part of the trade to the relevant individual fund.

Any parts of a block trade that are not allocated on trade date should be reported with the fund manager as the counterparty. This reporting logic would only apply where the allocation post trade date is permitted by the applicable national legislation.

Part IV: Reporting to TRs – Transaction scenarios

Date last updated: 11 February 2014

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[9];
- 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 not carrying out an economic activity and who are consequently not considered as undertakings (see European Commission FAQ no. 14) are not subject to the reporting obligation under EMIR, only bodies as defined in Article 2(8) and (9) of EMIR; therefore, in all examples below, when such an individual is a counterparty to a trade, he does not have reporting obligations; the other counterparty, in case it is not another individual, will have the obligation to report the trade to a trade repository, including the internal code of the individual with whom it has concluded the transaction;
- delegation of reporting is a possibility under EMIR, including:

[9] (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).

- one counterparty delegates on the other counterparty;
- one counterparty delegates on a third party;
- both counterparties delegate on a single third party;
- both counterparties delegate on two different third parties;

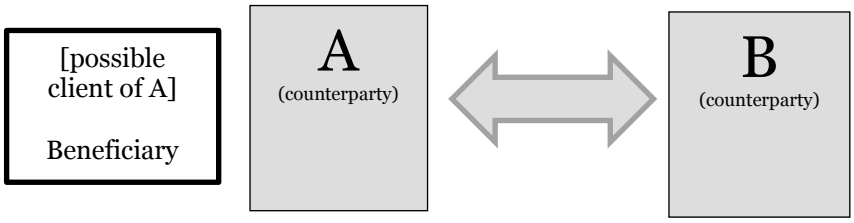
– all the examples below will be compatible with any of the possibilities above in case the two counterparties do not report directly: following the principle of avoiding duplication and ensuring reporting, ESMA is favourable to centralised reporting (i.e. by the venue in which a non-OTC has been concluded or by the CCP in which it is being cleared); however, this should be always a matter of agreement by the counterparties, based on voluntary delegation arrangements;

– since the obligation to report lies always on the counterparties to a trade, whenever a third party is performing that function through a previous agreement (on behalf of one or both counterparties), it shall ensure that all relevant data are provided by the counterparties to fulfil the reporting obligation;

– it is important to take into account that investment firms that provide investment services (like execution of orders or receipt and transmission of orders) do not have any obligation to report under EMIR unless they become a counterparty of a transaction by acting as principal: nothing prevents counterparties to a derivative to use an investment firm (as a broker) as a third party for TR reporting, but this is a general possibility in all cases, thus the examples below do not develop that possibility further.

– the cases herein follow an operational perspective with a view to efficient reporting to TRs, rather than the exact legal structure and number of contracts within a derivatives transaction, notably ETDs. This is consistent with the approach taken in the Commission Delegated Regulation no. 148/2013 (notably Article 2 on cleared trades).

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

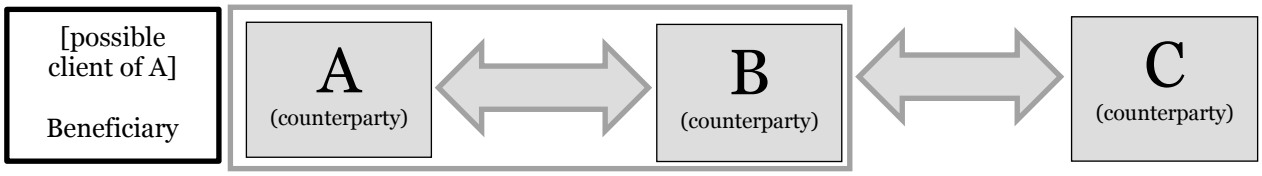


No specific provisions apply to this case. Both counterparties have an obligation to report.

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

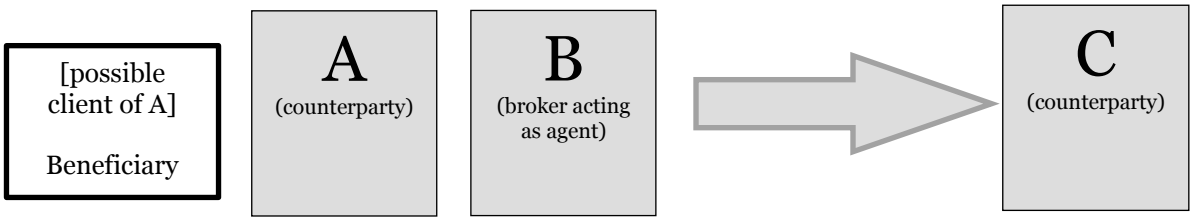


A is a client of B. They conclude a transaction that is back-to-back to another transaction that B is concluding with C.

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.

Part V: Reporting to TRs – ETD contracts reporting

Date last updated: 20 December 2013

ETDs Reporting Question 1

What is the scope of reporting covered by these questions and answers?

ETDs Reporting Answer 1

The questions and answers relating to the reporting of "ETD contracts" cover the reporting of the conclusion[10] of derivative contracts in any of the classes referred to in paragraphs 1 and 2 of Article 5 of the Commission Implementing Regulation (EU) No 1247/2012 that meet all of the following criteria.

1. The contract is subject to the rules of a trading venue[11] and is executed in compliance with those rules or on a similar trading venue outside the EU (note that this similarity point is only to be interpreted for the purpose of deciding which trades are covered by this section of questions and answers and does not imply any status for non-EU trading venues for any other purpose);

2. The rules of the trading venue provide for processing of the concluded contract by the trading venue after the execution and the subsequent clearing by a CCP within one working day of execution; and

3. The trade is cleared by a CCP.

ETDs Reporting Question 2

Which parties have to report ETD contracts?

ETDs Reporting Answer 2

One of the main purposes of the EMIR reporting obligation is to enable the authorities to identify and analyse risk positions, although the reports will have other uses as well. Therefore an authority analysing EMIR reports would expect to see the counterparties of a trade where the risk lies once the contract has been concluded.

In the particular case of derivatives admitted to trading on a regulated market, it should be recalled that they are already subject to reporting obligations under Article 25 of MiFID. Thus, in order to ensure con-

[10] To be understood as any trade that gives rise to a derivative contract.
[11] As defined in Article 2(8) of the Commission Regulation (EC) No 1287/2006, but excluding contracts concluded through a systematic internaliser.

sistency and avoid reporting conflicts between the two regimes, they should be aligned to the maximum extent possible including, among others, the counterparties submitting the reports. Further, Article 1(2) of the EMIR Delegated Regulation No 148/2013 provides that '<…> conclusion of a contract' shall mean 'execution of a transaction' as referred to in Article 25(3) of MiFID.

In order to achieve this objective, all of the following will be deemed to have an EMIR reporting obligation upon conclusion of a contract to the extent that they are subject to the reporting obligations in EMIR and are counterparties to the contract:

1. The CCP clearing the trade.

2. The clearing members of the CCP that are clearing the trade.

3. The MiFID investment firm[12] that executes the trade on the trading venue of which it is a member.

4. Counterparties to derivative contracts that do not fall into any of the categories above, except when they are exempt because of their status.

Any of these participants have an obligation to report any derivative contract that they have concluded with any of the other participants. Where they are in a "back to back" situation between two other such participants (as a clearing member would be if there is another counterparty involved in the trade such as a client, for example) then they shall report each of these separately.

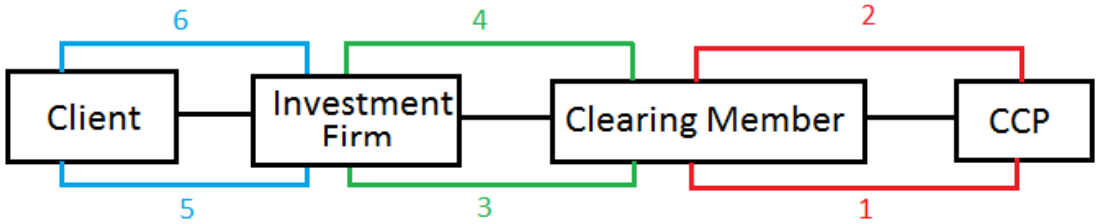
In the particular case of an investment firm that is not a counterparty to a derivative contract and it is only acting on the account of and on behalf of a client, by executing the order in the trading venue or by receiving and transmitting the order, such firm will not be deemed to be a counterparty to the contract and will not be expected to submit a report under EMIR.

Where an entity is fulfilling more than one of these roles (for example, where the investment firm is also the clearing member) then it does not have to report separately for each role and should submit one report identifying all the applicable roles in the relevant fields.

To show how this approach would work in practice to report the conclusion of a derivative contract, we use as an example a trading scenario in which a client executes using an investment firm and the trade is cleared through a separate clearing member of the CCP. Two versions are presented, one in which the investment firm is itself a counterparty to the trade (in the sense meant by EMIR) and the other in which it is not, but just acted on the account of and on behalf of the client to execute the trade. Only one side of the trade is described. Other trading scenarios are of course possible.

[12] As defined in Article 4(1)(1) of the Directive 2004/39/EC

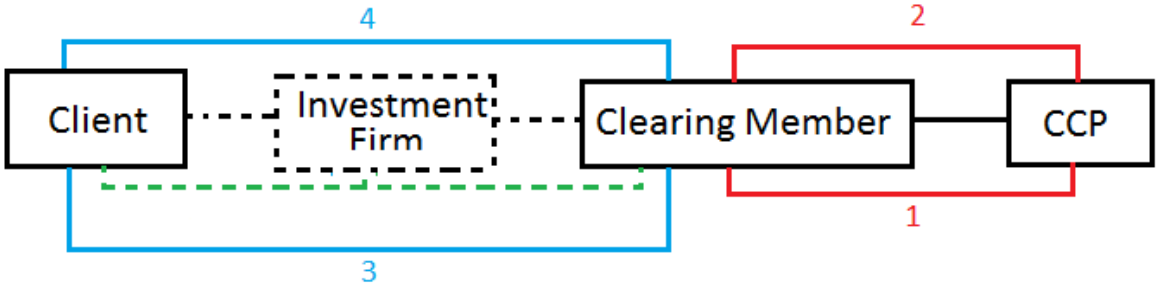
Scenario 1: the investment firm is itself counterparty trading on its own account (either on its own behalf or on behalf of a client), the following reports should be submitted:



Re-port	Who has the reporting obligation[13]?	Trade ID[14]	Transaction reference number[14]	Counterparty ID (2)	ID of the other coun-terparty (3)	Broker ID (8)	Clearing member ID (10)	Beneficiary ID (11)	Trading capacity (12)[15]	Coun-terparty side (13)	Venue of execu-tion	CCP
1	Clearing member	UTI001	TRN1	Clearing member	CCP		Clearing Member	Clearing member	'P'	'B'	MIC	CCP
2	CCP	UTI001	TRN1	CCP	Clearing member		Clearing member	CCP	'P'	'S'	MIC	CCP
3	Investment firm	UTI002	TRN1	Investment firm	Clearing member	Investment firm	Clearing member	Invest-ment firm	'P'	'B'	MIC	CCP
4	Clearing member	UTI002	TRN1	Clearing member	Investment firm	Investment firm	Clearing member	Clearing member	'P'	'S'	MIC	CCP
5	Client	UTI003	TRN1	Client	Investment firm	Investment firm	Clearing member	Client	'P'	'B'	MIC	CCP
6	Investment firm	UTI003	TRN1	Investment firm	Client	Investment firm	Clearing member	Invest-ment firm	'P'	'S'	MIC	CCP

[13] This column was inserted to clarify reporting obligations; it is not part of the reportable fields under Article 1(1) of Commission Delegated regulation (EU) No 148/2013.
[14] See ETD reporting question 5.
[15] This field refers to the trading capacity of the counterparty with the reporting obligation.

Scenario 2: the investment firm is not itself a counterparty and is trading on the account of and on behalf of a client, the following reports should be submitted:



Re-port	Who has the reporting obligation[16]?	UTI	Transaction reference number	Counterparty ID (2)	ID of the other coun-terparty (3)	Broker ID (8)	Clearing member ID (10)	Beneficiary ID (11)	Trading capaci-ty (12)[17]	Coun-terparty side (13)	Venue of execu-tion	CCP ID
1	Clearing member	UTI001	TRN1	Clearing member	CCP		Clearing member	Clearing member	'P'	'B'	MIC	CCP
2	CCP	UTI001	TRN1	CCP	Clearing member		Clearing member	CCP	'P'	'S'	MIC	CCP
3	Client	UTI002	TRN1	Client	Clearing member	Investment firm	Clearing member	Client	'P'	'B'	MIC	CCP
4	Clearing member	UTI002	TRN1	Clearing member	Client	Investment firm	Clearing member	Clearing member	'P'	'S'	MIC	CCP

[16] This column was inserted to clarify reporting obligations; it is not part of the reportable fields under Article 1(1) of Commission Delegated regulation (EU) No 148/2013.
[17] This fields refers to the trading capacity of the counterparty with the reporting obligation.

ETDs Reporting Question 3

How should give-ups be reported?

ETDs Reporting Answer 3

Where a give up occurs from the investment firm to the clearing member within the T+1 reporting deadline and there has not been any change of the economic terms of the original trade the trade should be reported in its post give up state according to the second reporting scenario illustrated in ETD question 2 above.

ETDs Reporting Question 4

Do partial executions have to be reported separately?

ETDs Reporting Answer 4

As parameters (e.g. price, time) and also counterparts (on markets which do not act anonymously) of partial executions of a trade will be different, each single execution shall be reported separately.

ETDs Reporting Question 5

How Trade IDs and Transaction Reference Numbers (TRN) should be assigned?

ETDs Reporting Answer 5

Each pair of reports (where both counterparties are subject to EMIR reporting obligations) or single reports (where only one of the counterparties is subject to EMIR reporting obligations) should have a unique Trade ID (Commission delegated Regulation 148/2013, Table 2, Field 8) value. Pending the agreement on a single approach for the construction of the Trade ID at the European level, the Trade ID should be based on a unique code generated and agreed with the other counterparty.

The Transaction Reference Number (Table 2 Field 9) should be the same among groups of reports which relate to the same execution.

There is no requirement to ensure that the TRN reported under EMIR has the same value as the Transaction Reference Number reported under MiFID.

In order to ensure uniqueness across reports relating to the same execution, the TRN should be based on a unique code assigned to this execution. The generation of the TRN should have its origin in a centralised infrastructure (e.g. the trading venue or the CCP). The reference number should be by default the execution code assigned by the trading venue. In case this is not feasible or available due to the market model, a code generated at the clearing level by the CCP can be used.

The reporting counterparties are expected to obtain that reference number from the trading or clearing confirmations that they receive from the investment firm or from the clearing member or CCP. They are also expected to transmit the reference number to their counterparties to allow them to fulfil their reporting obligations.

A non-exhaustive list of trading/clearing cases and how the TRN should be populated is the following.

Scenario	Approach to reporting TRN
There is a one-to-one relationship between the reports (e.g. one execution for a single client cleared through a single clearing member).	The TRN is a single code to be used in all the reports listed in the scenarios above
There is a one-to-n relationship, (e.g. a single execution is allocated to n clients who clear either through one or several clearing members).	The same TRN will be used for all n clients and for all the reports listed in the scenarios above.
There is a n-to-one relationship (e.g. several executions at a trading venue are aggregated at an average price for a single client who clears through one clearing member).	A code relating to any of the several executions which are subsequently aggregated shall be used. It is suggested to use the code of the last of the executions that were aggregated.

ETDs Reporting Question 6

How should the time stamps be populated?

ETDs Reporting Answer 6

The Execution timestamp (Table 2 Field 19) should correspond to the time of execution on the trading venue of execution as per Commission Delegated Regulation (EU) No 148/2013.

The Clearing timestamp (Table 2 Field 30) should be reported as the time at which the CCP has legally taken on the clearing of the trade.

For markets where clearing takes place using the open offer model, these two times are expected to be the same.

For markets where clearing takes place using novation, these two times may be different.

ETDs Reporting Question 7

Who should report the value of the collateral for ETDs?

ETDs Reporting Answer 7

The Value of the collateral (Table 1 Field 25) should be reported as the total value of the collateral posted by the Counterparty responsible for the report (the entity identified in the 'who has the obligation to report' column in the scenarios above, that is the participant identified in Table 1 Field 2 in Commission Delegated Regulation (EU) No 148/2013).

In the particular case when the investment firm is not involved in the process of receiving and/or posting any collateral for the client because of the direct arrangements between the client and the clearing member, the investment firm is not expected to submit any report on the value of the collateral, or on any subsequent modification as well as termination of the concluded derivative contract.