

EMIR 3.0:
ACTIVE ACCOUNT PROPOSAL SEEKS TO
REDUCE EU RELIANCE ON THIRD COUNTRY
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Abstract

On 7 December 2022, the European Commission published its long-anticipated 'EMIR 3.0' proposal to improve the attractiveness of EU central counterparties (CCPs) and to foster the resilience of central clearing in the EU. In an attempt to reduce reliance of EU market participants on third country CCPs, the texts from the Commission propose substantial amendments to the 2012 European Market Infrastructure Regulation (EMIR) and related EU legislative acts such as the Capital Requirements Regulation (CRR). Central to the suggested reforms is the proposed requirement for certain EU market participants to clear at least a portion of 'systemically relevant derivatives' through 'active accounts' at EU CCPs, i.e. mandatory accounts at EU CCPs through which a certain level of central clearing activity would have to occur. This paper provides a first analysis of the proposed active account requirement and frames it against the post-Brexit EU drive to limit risks to the EU financial system that may follow from strong reliance by EU market participants on clearing services provided by UK CCPs.

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EMIR 3.0:

Active Account Proposal Seeks to Reduce EU Reliance on Third Country CCPs

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§ 1. INTRODUCTION

1. **EMIR 3.0** – On 7 December 2022, the European Commission published its long-anticipated ‘EMIR 3.0’ proposal to improve the attractiveness of EU central counterparties (CCPs) and to foster the resilience of central clearing in the EU.² In an attempt to reduce reliance of EU market participants on third country CCPs, the texts from the Commission propose substantial amendments to the 2012 European Market Infrastructure Regulation (EMIR)³ and related EU legislative acts such as the Capital Requirements Regulation (CRR)⁴. Central to the suggested reforms is the proposed requirement for certain EU market participants to clear at least a portion of ‘systemically relevant derivatives’ through ‘active accounts’ at EU CCPs, *i.e.* mandatory accounts at EU CCPs through which a certain level of central clearing activity would have to occur.

This paper provides a first analysis of the proposed active account requirement and frames it against the post-Brexit EU drive to limit risks to the EU financial system that may follow from strong reliance by EU market participants on clearing services provided by UK CCPs. The continuation of the paper is structured as follows. First, the second paragraph briefly introduces EMIR. Secondly, the third paragraph restates the conceptual function of CCPs and connects this to the central clearing obligation that was introduced through EMIR. Thirdly, the fourth paragraph explains under what conditions EU and third country CCPs are currently allowed to provide clearing services in the EU. Finally, the fifth paragraph explores the proposed requirement for certain market participants to hold an active account

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² European Commission, Proposal for a regulation of the European Parliament and of the Council amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets, 7 December 2022, COM(2022) 697 final, 2022/0403(COD); European Commission, Proposal for a directive of the European Parliament and of the Council amending Directives 2009/65/EU, 2013/36/EU and (EU) 2019/2034 as regards the treatment of concentration risk towards central counterparties and the counterparty risk on centrally cleared derivative transactions, 7 December 2022, COM(2022) 698 final, 2022/0404(COD).

³ 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, *OJ L* 201, 27 July 2012, 1.

⁴ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, *OJ L* 176, 27 June 2013, 1.



at an EU CCP for derivatives with systemic relevance. It should be noted that this paper is based on the text of the initial EMIR 3.0 proposal from the Commission for an active account requirement and that, if ultimately adopted, the active account requirement may be subject to significant amendments, especially given the far-reaching implications for the market for clearings services.⁵

§ 2. EMIR

2. **EMIR** – EMIR is the cornerstone of the EU legislative and regulatory derivatives markets reforms that were launched in the wake of the 2008 financial crisis. In line with the G20 commitments for derivatives markets reform,⁶ the main objective of EMIR is to mitigate the risks to financial stability stemming from derivatives markets.⁷ To achieve this objective, EMIR imposed four sets of rules.⁸ First, EMIR establishes an obligation to clear a selected subset of over-the-counter (OTC) derivatives concluded between certain market participants through an authorized or recognized CCP.⁹ Secondly, EMIR demands that counterparties to non-centrally cleared OTC derivatives apply certain bilateral risk-mitigation techniques.¹⁰ Thirdly, EMIR contains an obligation for market participants to report the details of their derivatives (traded OTC or multilaterally) to registered or recognized trade repositories.¹¹ Finally, EMIR outlines the framework and rules for the financial market infrastructures (FMIs) that are needed to implement the clearing and reporting obligation, *i.e.* CCPs and trade repositories.

3. **Amendments to EMIR** – If adopted, the EMIR 3.0 proposal from the European Commission would be the third major reform of EMIR since its adoption in 2012. EMIR has been amended multiple times since its adoption, but most substantively in the aftermath of

⁵ See, e.g.: ESRB, *Letter from Francesco Mazzafarro (Head of the ESRB Secretariat) to the Council Working Party on EMIR review*, 20 March, ESRB/2023/0047, available via https://www.esrb.europa.eu/pub/pdf/other/esrb.letter230320_on_emir_review~f6a95f64c5.en.pdf.

⁶ See e.g. the September 2009 Pittsburgh statement by the Heads of State and Government of the G20, which has generally been regarded as the start of the post-2008 multi-jurisdictional overhaul of derivatives legislation and regulation: “[a]ll standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements.” G20, *Leaders’ Statement: The Pittsburgh Summit*, 24-25 September 2009, recital 13, bullet 3, available via <http://www.g20.utoronto.ca/2009/2009communique0925.html>.

⁷ Cf. recital 4 EMIR.

⁸ See in more detail on these obligations e.g., E. CALLENS, *Regulation of Central Counterparties (CCPs) in Light of Systemic Risk: CCP Market Access Regimes in Global Markets*, Cambridge, Intersentia, 2022, 286 *et seq.*

⁹ Art. 4 EMIR.

¹⁰ Art. 11 EMIR.

¹¹ Art. 9 EMIR.



Brexit by the EMIR Refit¹² (May 2019)¹³ and EMIR 2.2 (December 2019)¹⁴. The EMIR Refit *inter alia* sought to simplify and standardize certain elements of the EMIR reporting obligation and the EMIR clearing obligation. EMIR 2.2, established, among other things, a two-tiered system for third country CCP recognition (see *infra* §4). Whereas the EMIR Refit aimed to recalibrate the EMIR clearing and reporting obligation in an attempt to provide regulatory relief to market participants, EMIR 2.2 sought to preserve EU financial stability from the consequences of the UK's departure from the EU.¹⁵

§ 3. CCPs AND THE EMIR CENTRAL CLEARING OBLIGATION

4. **CCPs** – In its essence, a CCP is a legal entity that interposes itself between the initial counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer.¹⁶ This means that, after CCP interposition, two mirroring legally binding contracts come into existence between the CCP and the respective entities on both sides of the transaction. If a CCP interposes itself into a financial transaction and does not default itself, the initial counterparties to the contract are shielded from the direct repercussions of their initial counterparty's failure to meet its contractual obligations, *i.e.* they are protected against the counterparty risk *vis-à-vis* their initial counterparty.¹⁷ Through various mechanisms (*e.g.*, a default fund financed by the clearing members), CCPs are to a certain extent financially backed by the clearing members that use the CCP to clear their transactions. Hence, from an economic point of view, central clearing through a CCP may under certain conditions function as a risk mutualization mechanism.¹⁸

5. **EMIR clearing obligation** – As briefly touched upon above, EMIR obliges certain market participants to clear a selected subset of (highly liquid and standardized) OTC derivatives through CCPs that have been authorized (EU CCPs) or recognized (third country CCPs) pursuant to EMIR (see in more detail on CCP authorization and recognition; *infra* §4).¹⁹ The EMIR clearing obligation has had a profound impact on the derivatives markets in the EU.

¹² The acronym Refit refers to the “regulatory fitness and performance programme” from the European Commission, which seeks to simplify EU law.

¹³ Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories, *OJ L* 141, 28 May 2019, 42.

¹⁴ Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third country CCPs, *OJ L* 322, 12 December 2019, 1.

¹⁵ ESMA, *ESMA Strategic Orientation 2020-22*, 9 January 2020, ESMA22-106-1942, 18, available via https://www.esma.europa.eu/sites/default/files/library/esma22-106-1942_strategic_orientation_2020-22.pdf.

¹⁶ *Cf.* art. 2(1) EMIR.

¹⁷ From an economic perspective, a CCP may thus be regarded as a ‘commitment mechanism’ seeking to assure performance of contractual obligations. See R. T. COX, R. S. STEIGERWALD, *A CCP is a CCP is a CCP*, Policy Discussion Paper Federal Reserve Bank of Chicago no. 2017-01, April 2017, 2, available via <https://www.chicagofed.org/publications/policy-discussion-papers/2017/pdp-1>.

¹⁸ *Cf. e.g.* H. PEIRCE, “Derivatives Clearinghouses: Clearing the Way to Failure”, *Cleveland State Law Review* 2016, vol. 64, (589) 602; C. PIRRONG, “The Clearinghouse Cure”, *Regulation* 2008, vol. 31, (44) 45.

¹⁹ Art. 4 EMIR.



It forced the most liquid and standardized OTC derivatives to move towards CCPs, whereas large segments of these contracts were previously ‘cleared bilaterally’, *i.e.* risk management and potential loss absorption was structured exclusively between the counterparties to the derivative contract. Crucial in light of the EMIR 3.0 proposal is that the EMIR clearing obligation does at present not oblige EU market participants that are subject to the clearing obligation to use a CCP that is authorized (and thus established) in the EU. Indeed, market participants can currently comply with the EMIR clearing obligation by having their OTC derivatives cleared by a third country CCP that has been recognized by the European Securities and Markets Authority (ESMA). If adopted, the ‘active account’ requirement proposed by the European Commission will put limits on the extent to which third country CCPs can be used to satisfy the EMIR clearing obligation.

§ 4. POST-BREXIT EU REGIME FOR CCP MARKET ACCESS

6. EU regime for CCP market access – Since the adoption of EMIR and in line with the policy approach in many other segments of EU financial law, the EU employs a double-track licensing system for CCP market access, establishing distinct entry points and procedures for respectively applicant CCPs established in the EU (“authorization”) and applicant CCPs established in third countries (“recognition”). Under the authorization track (EU CCPs), any legal person established in the EU aiming to provide clearing services as a CCP can obtain market access if it fully complies with the harmonized EU legislative and regulatory CCP framework on an ongoing basis, as assessed by the national competent authority of the applicant.²⁰ Since the core of the EMIR 3.0 proposal is targeted at the market access regime for third country CCPs, the authorization requirements and process is not further discussed in this paper.

7. Recognition of non-systemically important third country CCPs – Under the recognition track (third country CCPs), the current market access framework—which was installed by EMIR 2.2 in response to Brexit—draws a critical distinction between non-systemically important and systemically important third country CCPs.²¹ For each third country CCP applying for recognition, ESMA will conduct an assessment against predefined criteria to determine whether the third country CCP should be deemed systemically important or likely to become systemically important for the financial stability of the EU or one of its member states.²²

Non-systemically important third country CCPs for which certain ‘regular’ recognition requirements are satisfied can obtain a recognition decision from ESMA, essentially allowing them to offer their clearing services in the EU through compliance with their home country

²⁰ Art. 14 EMIR. The procedure governing the application process is detailed in art. 17 EMIR. See also art. 15 EMIR.

²¹ See art. 25 EMIR.

²² Art. 25(2a)(1) EMIR and Commission Delegated Regulation (EU) 2020/1303 of 14 July 2020 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the criteria that ESMA should take into account to determine whether a central counterparty established in a third country is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States, *OJ L* 305, 21 September 2020, 7.



regulatory and supervisory framework.²³ The most important recognition criterion is that an equivalence decision from the European Commission must be in place determining the equivalence of the relevant third country regulatory and supervisory framework for CCPs.²⁴ The baseline EU recognition regime for non-systemically important third country CCPs – which applied to *all* third country CCPs prior to the adoption of EMIR 2.2 – can conceptually be best understood as fitting within the regulatory paradigm of “mutual recognition”.²⁵

8. Recognition of systemically important third country CCPs – In deviation from the baseline for third country CCP recognition, EMIR 2.2 has subjected systemically important third country CCPs to an additional layer of requirements. First, in addition to compliance with their home country legislative and regulatory framework, systemically important third country CCPs must comply on an ongoing basis with virtually all material EMIR-provisions for CCPs.²⁶ However, when assessing the compliance of a systemically important third country CCP with EMIR, ESMA shall consider the extent to which a CCP’s compliance with those requirements may be deemed satisfied by its compliance with comparable requirements applicable in its home country (“comparable compliance”).²⁷ Secondly, in addition to home country supervision, systemically important third country CCPs are subject to supervision by ESMA with regard to the compliance with EMIR.²⁸

9. Location policy for third country CCPs that are deemed ‘too systemically important’ – Even if a systemically important third country CCP complies with EMIR and subjects to supervision by ESMA, ESMA may conclude, on the basis of a fully reasoned assessment and commensurate with the degree of systemic importance of the CCP,²⁹ that the CCP or some of its clearing services are of such substantial systemic importance that that CCP should not be recognized to provide these clearing services.³⁰ This is the so-called EMIR 2.2 “CCP location

²³ See more in detail on the recognition criteria: art. 25(2) EMIR.

²⁴ See art. 25(2)(a) and (6) EMIR. See more in detail: E. CALLENS, *Regulation of Central Counterparties (CCPs) in Light of Systemic Risk: CCP Market Access Regimes in Global Markets*, Cambridge, Intersentia, 2022, 450 *et seq.*

²⁵ Mutual recognition refers to the notion that regulators and supervisors from different jurisdictions reciprocally recognize that the concerned foreign regulatory and supervisory regimes are sufficiently similar to allow that compliance with the foreign regulatory and supervisory framework is deemed to function as a (partial) substitute for compliance with the domestic framework. Cf. e.g., P.-H. VERDIER, “Mutual Recognition in International Finance”, *Harvard International Law Journal* 2011, vol. 52, (55) 57 and 63; P. B. GRIFFIN, “The Delaware Effect: Keeping the Tiger in its Cage. The European Experience of Mutual Recognition in Financial Services”, *Columbia Journal of European Law* 2001, vol. 7, (337) 337.

²⁶ Art. 25(2b)(a) EMIR. These provisions consist of arts. 16 and 26-54 EMIR. Only art. 7 EMIR regarding non-discriminatory CCP access requirements is exempted.

²⁷ Arts. 25(2b)(a) and 25a EMIR.

²⁸ Art. 25b EMIR.

²⁹ For the interpretation of the “degree of systemic importance of the relevant CCP”, art. 25(2c)(1) EMIR refers to art. 25(2a) EMIR. See also: ESMA, *Methodology for assessing a Third Country CCP under Article 25(2c) of EMIR*, 12 July 2021, ESMA91-372-1436, available via https://www.esma.europa.eu/sites/default/files/library/methodology_for_assessing_a_tc_ccp_under_article_252c_of_emir.pdf, 14 p.

³⁰ Art. 25(2c)(1) EMIR. Prior to reaching such conclusion, ESMA should consult the European Systemic Risk Board (ESRB) and, in accordance with art. 24b(3) EMIR, the central banks of issue of all EU currencies of the financial instruments cleared or to be cleared by the CCP should agree with the elements of the conclusion that relate to the currency issued by the relevant central bank of issue.



policy". In its assessment of the 'too systemically important' nature or substantial systemic importance of a third country CCP or its clearing services, ESMA must *inter alia* explain how compliance with the 'regular' conditions for systemically important third country CCPs would not sufficiently address the financial stability risk for the EU or its member states and provide a quantitative technical cost-benefit analysis of a decision not to recognize, or limit the scope of the recognition of, a third country CCP.³¹ On the basis of its assessment, ESMA shall then recommend that the European Commission adopt an implementing act confirming that that CCP should not be recognized to provide certain clearing services or activities.³² The implication of such decision by the European Commission would be that the third country CCP must either stop providing clearing services in the EU or relocate to the EU if it seeks to continue providing clearing services to EU market participants.

10. 2021 assessment by ESMA – At the end of 2021, ESMA published an assessment report in the sense of art. 25(2c) EMIR in relation to two UK CCPs (LCH Ltd. and ICE Clear Europe Ltd.), concluding that the following three clearing services provided by these CCPs were of substantial systemic importance for the financial stability of the EU or its member states: (i) SwapClear for the central clearing of interest rate derivatives denominated in euro and Polish zloty (offered by LCH Ltd.); and (ii) the credit default swaps (CDS) and the short-term interest rate (STIR) derivatives services (offered by ICE Clear Europe Ltd.), in both cases for euro-denominated products.³³ However, ESMA also concluded that the costs of a decision to not recognize the examined clearing services of the involved CCPs would for the time being outweigh the benefits, *inter alia* because of the market and liquidity fragmentation that would occur in case UK CCPs were to be barred from providing certain clearing services.³⁴ Such

However, if the outcome of ESMA's assessment under art. 25(2c) EMIR were to be that the examined CCP or some of its clearing services are *not* of such substantial systemic importance that that CCP should not be recognized to provide certain clearing services, consultation of the ESRB and agreement with the relevant central banks of issue is formally not required by EMIR.

³¹ Art. 25(2c)(1) EMIR.

³² Art. 25(2c)(2) EMIR.

³³ ESMA, *Assessment Report under Article 25(2c) of EMIR: Assessment of LCH Ltd and ICE Clear Europe Ltd*, 16 December 2021, ESMA91-372-1945, 141, available via https://www.esma.europa.eu/sites/default/files/library/esma91-372-1945_redacted_assessment_report_under_article_252c_of_emir_ukccps_final_1of2.pdf (part one) and https://www.esma.europa.eu/sites/default/files/library/esma91-372-1945_redacted_assessment_report_under_article_252c_of_emir_ukccps_final_2of2.pdf (part two). See also: ESMA, *Public statement: ESMA concludes Tier 2 CCP assessment under Article 25(2c) of EMIR*, 17 December 2021, ESMA91-372-1913, available via https://www.esma.europa.eu/sites/default/files/library/esma91-372-1913_statement_uk_ccp_article25_2c_assessment_2021.pdf, 6 p.; ESRB, *ESRB response to ESMA's consultation on determining the degree of systemic importance of LCH Ltd and ICE Clear Europe or some of their clearing services*, 3 December 2021, available via https://www.esma.europa.eu/sites/default/files/library/redacted_esrb_response_letter_to_esmas_consultation.pdf, 13 p.

³⁴ ESMA, *Assessment Report under Article 25(2c) of EMIR: Assessment of LCH Ltd and ICE Clear Europe Ltd*, 16 December 2021, ESMA91-372-1945, 141, available via https://www.esma.europa.eu/sites/default/files/library/esma91-372-1945_redacted_assessment_report_under_article_252c_of_emir_ukccps_final_1of2.pdf (part one) and https://www.esma.europa.eu/sites/default/files/library/esma91-372-1945_redacted_assessment_report_under_article_252c_of_emir_ukccps_final_2of2.pdf (part two).



fragmentation could jeopardize effective risk and clearing member default management at CCPs, which could in turn produce financial stability risks.³⁵ In line with its conclusion, ESMA did not issue a recommendation to the Commission to adopt an implementing act specifying that the involved CCPs should not be recognized to provide the identified clearing services.³⁶ However, ESMA did call for the adoption of appropriate measures and safeguards for the mitigation of the existing risks from overreliance on certain clearing services provided by the assessed UK CCPs.³⁷ Among other things, ESMA suggested to the relevant EU authorities to consider adopting appropriate incentives for reducing the size of the EU's exposure to systemically important third country CCPs.³⁸ Just prior to the articulation by ESMA of its suggestions for reform, European Commissioner for Financial Services, Financial Stability, and Capital Markets Union Mairead MCGUINNESS similarly called for measures to make EU-based CCPs more attractive to market participants in a statement on the proposed way forward for central clearing in the post-Brexit era.³⁹

§ 5. EMIR 3.0 ACTIVE ACCOUNT PROPOSAL

11. Remaining concern about financial stability risk – The far-reaching reforms that EMIR 2.2 has brought to the market access regime for third country CCPs have not been sufficient to assure EU policymakers about financial stability risks that may follow from the strong reliance by EU market participants on third country CCPs. After EMIR 2.2 had been fully implemented, the European Commission has only multiple occasions expressed its concerns about the financial stability risk that may follow from strong reliance by EU market participants on third country CCPs—particularly UK CCPs—and has urged EU market participants to reduce their reliance on clearing services provided by third country CCPs.⁴⁰

³⁵ E. CALLENS, *Regulation of Central Counterparties (CCPs) in Light of Systemic Risk: CCP Market Access Regimes in Global Markets*, Cambridge, Intersentia, 2022, 502 *et seq.*

³⁶ ESMA, *Assessment Report under Article 25(2c) of EMIR: Assessment of LCH Ltd and ICE Clear Europe Ltd*, 16 December 2021, ESMA91-372-1945, 141, available via https://www.esma.europa.eu/sites/default/files/library/esma91-372-1945_redacted_assessment_report_under_article_252c_of_emir_ukccps_final_1of2.pdf (part one) and https://www.esma.europa.eu/sites/default/files/library/esma91-372-1945_redacted_assessment_report_under_article_252c_of_emir_ukccps_final_2of2.pdf (part two).

³⁷ ESMA, *Assessment Report under Article 25(2c) of EMIR: Assessment of LCH Ltd and ICE Clear Europe Ltd*, 16 December 2021, ESMA91-372-1945, 141-144, available via https://www.esma.europa.eu/sites/default/files/library/esma91-372-1945_redacted_assessment_report_under_article_252c_of_emir_ukccps_final_1of2.pdf (part one) and https://www.esma.europa.eu/sites/default/files/library/esma91-372-1945_redacted_assessment_report_under_article_252c_of_emir_ukccps_final_2of2.pdf (part two).

³⁸ *Ibid*, 141.

³⁹ EUROPEAN COMMISSION, *Statement: Commissioner McGuinness announces proposed way forward for central clearing*, 10 November 2021, available via https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_5905, 2 p.

⁴⁰ Cf. e.g., recital 2 Commission Implementing Decision (EU) 2020/1308 of 21 September 2020 determining, for a limited period of time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council, OJ L 306, 21 September 2020, 1. See also: EUROPEAN COMMISSION, *Statement: Commissioner McGuinness announces proposed way forward for central clearing*, 10 November 2021, available via https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_5905, 2 p. Cf. H. JONES, D. MILLIKEN, “UK will resist 'dubious' EU pressure on banks, says BoE's Bailey”, Reuters, 24 February



12. EMIR 3.0 consultation – Against the backdrop of the remaining concern of EU policymakers about the financial stability risk arising from strong reliance on third country CCPs, the European Commission launched a targeted consultation in early February 2022 on the review of the central clearing framework in the EU.⁴¹ This consultation came against the background of a double objective: (i) to build EU clearing capacity through measures to make the EU more attractive as a competitive and cost-efficient clearing hub; and (ii) to reinforce supervision over EU CCPs, which is deemed appropriate if the EU is to increase its capacity for central clearing.⁴² A key element on which views were collected was the notion of so-called ‘active accounts’, *i.e.* mandatory accounts at EU CCPs through which a certain level of central clearing activity would have to occur.⁴³

13. Active account requirement under EMIR 3.0 proposal – Under the current EMIR 3.0 proposal (which may still be subject to significant amendments)⁴⁴, EU (financial and non-financial) market participants that are subject to the above-described EMIR clearing obligation for OTC derivatives will be required to clear at least a portion of ‘systemic derivatives’ through active accounts at EU CCPs.⁴⁵ The idea is that by forcing EU market participants to hold active accounts at EU CCPs for the selected asset classes, EU market participants will reduce their reliance on third country CCP clearing services that are deemed to be of substantial systemic importance for the financial stability of the EU.⁴⁶ As could, for instance, be derived from the fact that ESMA decided in 2021 to not propose derecognition of the third country CCP clearing services that were deemed to be of substantial systemic importance because costs would have outweighed benefits (*e.g.*, due to market and liquidity fragmentation), regulatory interventionism in the market for clearing services may not be without costs for market participants or risks to financial stability. Indeed, it can be expected that the proposed EMIR 3.0 active account requirement will reduce netting efficiencies in existing centrally cleared

2021, available via <https://www.reuters.com/article/britain-eu-bailey/update-1-uk-will-resist-eu-pressure-on-banks-over-clearing-boes-bailey-idUSL1N2KU1N9>; H. JONES, “Exclusive: Top banks asked to justify why they still clear euro swaps in London”, Reuters, 23 February 2021, available via <https://www.reuters.com/article/idUSKBN2AN1DR>.

⁴¹ EUROPEAN COMMISSION, *Consultation document: Targeted consultation on the review of the central clearing framework in the EU*, 8 February 2022, available via https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2022-central-clearing-review-consultation-document_en.pdf, 46 p.

⁴² EUROPEAN COMMISSION, *Consultation document: Targeted consultation on the review of the central clearing framework in the EU*, 8 February 2022, 3, available via https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2022-central-clearing-review-consultation-document_en.pdf.

⁴³ EUROPEAN COMMISSION, *Feedback statement: Summary Report of the Targeted Consultation on the Review of the Central Clearing Framework in the European Union (“EMIR”)*, 7 December 2022, 7, available via https://finance.ec.europa.eu/system/files/2022-12/2022-central-clearing-review-summary-of-responses_en.pdf.

⁴⁴ See, *e.g.*: ESRB, *Letter from Francesco Mazzaferro (Head of the ESRB Secretariat) to the Council Working Party on EMIR review*, 20 March, ESRB/2023/0047, available via https://www.esrb.europa.eu/pub/pdf/other/esrb.letter230320_on_emir_review~f6a95f64c5.en.pdf.

⁴⁵ See draft art. 7a EMIR, as proposed under EMIR 3.0. The requirement to centrally clear such specific derivatives through an EU CCP could be met via accounts opened either directly at an EU CCP or indirectly through a clearing arrangement with a clearing member which in turn has direct access to the CCP.

⁴⁶ Cf. draft recital 10 of EMIR 3.0.



portfolios by breaking up netting sets, leading to suboptimal collateral allocations and potentially adverse effects in terms of financial stability.⁴⁷ Additionally, market participants that would prefer, in absence of regulatory pressure, to not maintain an active account at an EU CCP will incur operational costs to be able to maintain several accounts at multiple CCPs (EU and third country). Viewed together, these effects may place EU market participants at a competitive disadvantage in comparison to non-EU market participants, who would not be subject to the proposed EMIR 3.0 active account requirement.

The systemic derivatives that would be in scope of the EMIR 3.0 active account requirement are the classes of derivatives that correspond to the asset classes covered by the third country CCP clearing services that were identified by ESMA in its 2021 assessment as being of substantial systemic importance for the financial stability of the EU (*supra* no. 10): (i) interest rate derivatives denominated in euro and Polish zloty; (ii) CDS denominated in euro; and (iii) STIR derivatives denominated in euro.⁴⁸ If ESMA were to undertake a new assessment pursuant to art. 25(2c) EMIR and the scope of the services that are deemed to be of substantial systemic importance for the EU or the member states were to change, the European Commission is empowered under the proposal to adopt a delegated act to amend the level one text of EMIR to change the types of derivatives that are in scope of the active account requirement.⁴⁹

14. Level two implementation will be key – Importantly, under the proposed setup, ESMA, in cooperation with the European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA) and the European Systemic Risk Board (ESRB) and after consulting the European System of Central Banks (ESCB), will be empowered to develop draft regulatory technical standards specifying the details of the level of substantially systemic clearing services to be maintained in the active accounts at EU CCPs by the market participants that are subject to the clearing obligation.⁵⁰ The precise impact of the conceptually far-reaching intervention by EU policymakers in the market for clearing services – and the corresponding implications for market participants – will to a very large extent be determined by the content (*e.g.*, thresholds or ratios) of the active account regulatory technical standards drafted by ESMA and ultimately adopted by the European Commission. When developing these draft regulatory technical standards, the proposed EMIR 3.0 text requires ESMA to strive for an outcome under which the reliance on the identified third country CCP clearing services is reduced in such manner that clearing services in these types of derivatives do no longer pose a substantial systemic risk to the EU or its member states.⁵¹

⁴⁷ See more in detail: E. CALLENS, *Regulation of Central Counterparties (CCPs) in Light of Systemic Risk: CCP Market Access Regimes in Global Markets*, Cambridge, Intersentia, 2022, 502 *et seq.*

⁴⁸ See draft art. 7a(2) EMIR, as proposed under EMIR 3.0.

⁴⁹ See draft art. 7a(6) EMIR, as proposed under EMIR 3.0.

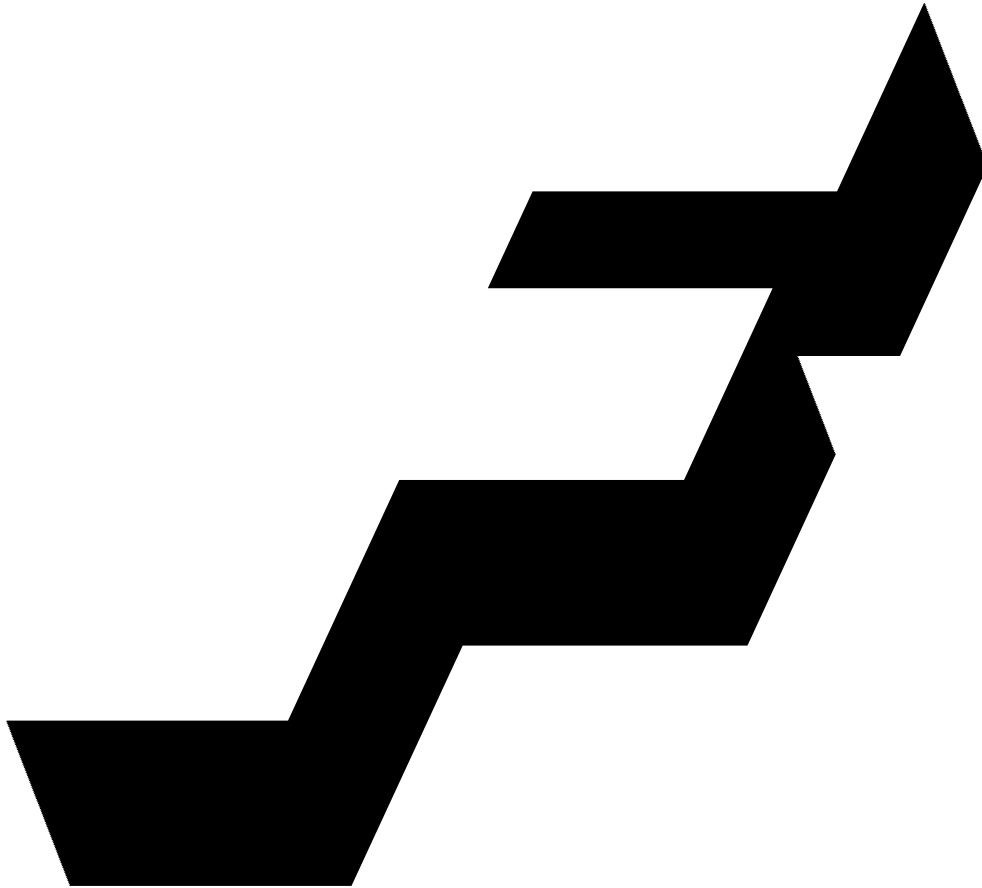
⁵⁰ See draft art. 7a(5) EMIR, as proposed under EMIR 3.0.

⁵¹ See draft art. 7a(5) EMIR, as proposed under EMIR 3.0. See also recital 11 EMIR 3.0, which *inter alia* states that ESMA should consider the costs, risks and the burden that its calibration of the active account requirement entails for market participants, the impact on their competitiveness, and the risk that those costs could be passed on to non-financial firms.



15. Reporting pursuant to the EMIR 3.0 active account requirement – Market participants subject to the EMIR 3.0 active account requirement shall under the proposed new rules be expected to calculate their activities in the categories of systemic derivatives at EU CCPs and annually report the outcome of this calculation to the competent authority of the CCP or CCPs that it uses.⁵² This should allow the competent authority to have a view on whether compliance with the active account requirements has been achieved.

⁵² See draft art. 7a(3) and (4) EMIR, as proposed under EMIR 3.0.



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