Consultation on the Conditions of the Active Account Requirement under EMIR 3

ESMA's consultation

January 2025

Question 1: Are there any aspects of the AAR scope on which ESMA has based its quantitative analysis and its policy choices that ESMA should consider detailing further?

PensionsEurope requests ESMA to confirm the timelines for making the notification to ESMA and NCAs concerning becoming subject to the active account requirement and establishing active accounts under Article 7a(1) EMIR. Considering the entry into effect of the Level I text in December 2024, we expect that counterparties subject to the active account requirement should submit the notification by June 2025. PensionsEurope notes that the template for this notification has already been published by ESMA on its website, with the following statement: "Starting on 24 December 2024, where a financial counterparty (FC) or a non-financial counterparty (NFC) becomes subject to the obligation to hold an active account by Article 7a(1) of EMIR, that FC or NFC shall notify ESMA and its relevant competent authority." Without further clarification on the timelines, we believe there is potential for confusion regarding the deadline for this notification. More broadly, we would like to ask ESMA to communicate when the first reference period starts.

Question 2: Do you agree with the above approach for condition (a)? Are there other requirements that ESMA should consider for meeting condition (a)?

The new Active Account Requirement, as further specified by the draft RTS, would be operationally burdensome for IORPs and other types of pension funds mainly in the Netherlands and Denmark. In line with the political priorities of the European Commission, we believe that the administrative burden should be reduced as much as possible. In this context, we propose that demonstrating a cleared portfolio with an EU CCP, which requires cash and collateral accounts, and the daily exchange of variation margin, provides sufficient evidence of operational and function connectivity. A written statement by the CCP that the counterparty about its portfolio should be sufficient to satisfy this condition."

Furthermore, we are concerned with Article 1(c) of the draft RTS which refers to "*with sufficient financial resources to meet the obligations arising from the direct or indirect participation in an authorised CCP*". As per paragraph 67 of the ESMA CP, operational capacity is distinct from and should not include counterparties' financial resources. **As such, the availability of financial resources on cash and collateral accounts is not constitutive of operational capacity**. Furthermore, this implies that counterparties are required to have financial resources available for stress-testing purposes under Article 3 of the RTS.

Question 3: Do you agree with the above approach for conditions (b) and (c)?

PensionsEurope agrees that certification by the CCP is an appropriate approach, provided that the responsibility for producing and providing the statements falls on the CCP instead of this being an obligation for counterparties to obtain these from the CCP. CCPs should be required to provide these statements without additional costs being imposed on counterparties.

PensionsEurope objects to the requirement under Article 2(1)(b) of the draft RTS to appoint at least one staff member with sufficient knowledge to support the proper functioning of the clearing arrangements at all times. Firms should have the flexibility to decide how to embed expertise concerning these clearing arrangements in their organization. In practice, this responsibility will often be with a dedicated team rather than one individual. We also note that EMIR does not require individuals with knowledge to support clearing arrangements to be identified, while EMIR mandates central clearing.

We would highlight that the measure of a threefold increase is a crude measure, which does not consider the specificities of counterparties. For example, a pension fund that hedges 40% of its interest rate risk with interest rate derivatives will not decide to increase the interest rate risk hedge to 120%. For counterparties already clearing the bulk of their positions at an EU CCP, the threefold increase also seems excessive. On the contrary, counterparties clear most on a third-party CCP, for them this would mean nothing because 3 times a negligible amount remains still negligible.

Question 4: Do you agree with the proposed approach for the annual stress-testing conditions (a), (b) and (c)?

We would like to repeat the same point made above concerning where the regulatory onus sits for the statements to be provided by the CCP. The draft RTS requires counterparties to "*conduct*" the tests. In practice, we would expect the stress tests would be run by the CCP. It is unclear what counterparties are expected to do for this purpose to meet the requirement of Article 3(1)(a) of the draft RTS.

Moreover, PensionsEurope is very concerned about providing market-sensitive and confidential information to the CCP, in case pension funds need to provide all outstanding positions. Rather, the information should be shared between the Clearing Member and the Clearing House.

Finally, ESMA wishes to stress-test over 5 liquidation days. We, however, believe that pension funds cannot trade this size in the market in 5 days, which makes this exercise not representative of a real-world scenario]

Question 5: Do you agree with the differentiated frequency for the stress-testing depending on the counterparties' clearing activities? Would you suggest any other way to take into account the proportionality principle?

Question 6: Do you agree with the proposed classes of derivatives for EUR OTC IRD?

Question 9: Do you agree with the proposed maturity and trade size ranges for each class of derivatives in EUR OTC IRD?

Question 12: Do you agree with the proposed number of most relevant subcategories for each clearing service of substantial systemic relevance?

Question 13: Do you agree with the proposed reference periods for EUR OTC IRD? Do you think the reference periods should be set at a more granular level (i.e. class of derivatives)?

Question 14:Do you agree with the proposed reference period for PLN OTC IRD? Do you think that the reference periods should be set at a more granular level (i.e. class of derivatives)?

Question 15: Do you agree with the proposed reference periods for EUR STIR referenced in Euribor? Do you agree with the proposed reference periods for EUR STIR referenced in €STR?

Question 16: Do you agree with the proposed approach for the reporting of the activity and risk exposures of the counterparty subject to the active account requirement?
PensionsEurope disagrees with the proposed approach to reporting the activity and risk exposures of counterparties subject to the active account requirements. Trade repository data is already collected so ESMA and NCAs have already the necessary data available. The proposals therefore lead to duplicative and unnecessarily burdensome reporting requirements.

Question 17: Do you consider that including information on margin activity in the AAR reporting requirement would provide valuable information on the activities and risk exposures of the counterparty?

PensionsEurope considers the information on margin activity in the AAR reporting requirement to create an unnecessary operational burden without clear justification. It is unclear why ESMA would require this information for assessing compliance with the active account since the representativeness requirement is based on the number of transactions rather than the amount of margin posted. Showing an active portfolio should be sufficient. Furthermore, initial margin and variation margin data are reported extensively by firms under Article 9 EMIR to trade repositories. ESMA already possesses relevant data and should require counterparties to resubmit.

Furthermore, a CCP can offer multiple different clearing models (e.g. EUREX ISA Direct and EUREX Cross Margining). Having the same trading activity (outstanding positions) at EUREX will populate

different Initial Margin requirements which will make reporting Initial Margin for OTC Cleared interest rate derivatives cumbersome. Using EUREX Cross Margining for example provides netting benefits between Futures/Options vs OTC Cleared Interest rate derivatives which means you cannot report initial margin requirements for OTC Cleared Interest rate derivatives separately.
Also, haircuts on Non-Cash Collateral used for Initial Margin are determined by the CCP and can change ad-hoc. Besides the Initial Margin from the CCP, a counterparty can have agreed on an operational buffer, a clearing member is using an Additional Collateral Amount. If you wish variation margin (no haircuts apply) and initial margin (haircuts only apply to Non-Cash Collateral), PensionsEurope would recommend the following: for the Variation Margin market, the value should be sufficient and Initial Margin Requirements are received from the Clearing Member.]

Question 18: Do you consider that including reporting on Unique Trade Identifiers (UTIs) would provide valuable information from a supervisory perspective?

Firms are already obliged to report UTIs under Article 9 EMIR. It is unclear what is the benefit of listing every trade they have entered the last 6 months and PensionsEurope does not see why this would be necessary for supervising compliance with the active account requirements.

Question 19: Do you agree with the proposed approach for the reporting of the operational conditions?

Question 20: Do you agree with the proposed approach for the reporting of the representativeness obligation?

Question 21: Do you agree with the proposed approach to standardise the reporting arrangements under the active account requirement?

About PensionsEurope

PensionsEurope represents national associations of pension funds and similar institutions for workplace and other funded pensions. Some members operate purely individual pension schemes. PensionsEurope has **25 member associations** in 18 EU Member States and 3 other European countries[1].

PensionsEurope member organisations cover different types of workplace pensions for approximately over **90 million people.** Through its Member Associations PensionsEurope represents approximately **€ 5 trillion of assets** managed for future pension payments. In addition, many members of PensionsEurope also cover personal pensions, which are connected with an employment relation.

[1] EU Member States: Austria, Belgium, Bulgaria, Croatia, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Netherlands, Portugal, Romania, Spain, Sweden. Non-EU Member States: Iceland, Norway, Switzerland.

PensionsEurope also has **18 Corporate and Supporter Members** which are various service providers and stakeholders that work with IORPs.

PensionsEurope has established a **Central & Eastern European Countries Forum (CEEC Forum)** to discuss issues common to pension systems in that region.

PensionsEurope has established a **Multinational Advisory Group (MAG)** which delivers advice on pension issues to PensionsEurope. It provides a collective voice and information sharing for the expertise and opinions of multinationals.

What PensionsEurope stands for

- A regulatory environment encouraging workplace pension membership;
- Ensure that more and more Europeans can benefit from an adequate income in retirement;
- Policies which will enable sufficient contributions and good returns.

Our members offer

- Economies of scale in governance, administration and asset management;
- Risk pooling and often intergenerational risk-sharing;
- Often "not-for-profit" and some/all of the costs are borne by the employer;
- Members of workplace pension schemes often benefit from a contribution paid by the employer;
- Wide-scale coverage due to mandatory participation, sector-wide participation based on collective agreements and soft-compulsion elements such as auto-enrolment;
- Good governance and alignment of interest due to participation of the main stakeholders.

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