



European Securities and
Markets Authority

Reply form for the consultation paper on indirect clearing arrangements under EMIR and MiFIR



5 November 2015

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the questions listed in this Consultation Paper on Indirect clearing arrangements under EMIR and MiFIR, published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA_QUESTION_RTS_INDIRECT_CLEARING_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- if they respond to the question stated;
- contain a clear rationale, including on any related costs and benefits; and
- describe any alternatives that ESMA should consider

Naming protocol

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_ RTS_INDIRECT_CLEARING_NAMEOFCOMPANY_NAMEOFDOCUMENT.

E.g. if the respondent were XXXX, the name of the reply form would be:

ESMA_RTS_ INDIRECT_CLEARING_XXXX_REPLYFORM or

ESMA_RTS_ INDIRECT_CLEARING_XXXX_ANNEX1

To help you navigate this document more easily, bookmarks are available in “Navigation Pane” for Word 2010 and in “Document Map” for Word 2007.

Deadline

Responses must reach ESMA by **17 December 2015**.



All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading [Legal Notice](#).

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_RTS_INDIRECT_CLEARING_1>

[Eurex Clearing welcomes the opportunity to provide input to the Consultation Paper on indirect clearing arrangements. The Consultation Paper attempts to provide solutions to a complex matter. Overall, Eurex Clearing supports ESMA's aim to promote the segregation and porting aspects in indirect clearing arrangements.

EMIR introduced two basic choices of client asset segregation: omnibus segregated accounts and individual segregated accounts to provide customers flexibility to choose their preferred level of protection.

Choice of segregation models is also being considered in the Consultation Paper specifying requirements for indirect clearing arrangements. As these models may differ from the ones already established and required under EMIR, ESMA should be aware that the emerging segregation models may not equally be offered to direct and indirect clients.

It is important that the Regulatory Technical Standards achieve consistency of the frameworks applicable to both Exchange Traded and OTC derivatives and ensure the same level of protection for indirect clients as is applied to clients through EMIR Article 39 and 48.]

<ESMA_COMMENT_RTS_INDIRECT_CLEARING_1>

Questions from the consultation paper

Q1. Do you agree with the proposed approach to require the choice between an omnibus indirect account and a gross omnibus indirect account with margin at the level of the CCP?

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_1>

[EMIR Articles 39 and 48 require segregation and portability solutions for the relationship between the CCP, its Clearing Members and clients of Clearing Members. EMIR Article 4 (3) and (4) require protection with equivalent effect as stipulated in Article 39 and 48 for indirect clearing arrangements for OTC derivatives subject to the clearing obligation. EMIR, however, does not prescribe how the omnibus segregated accounts have to be offered. This leaves sufficient flexibility for CCPs, Clearing Members and clients to develop appropriate models. Eurex Clearing generally agrees with ESMA's proposals to offer choice also for indirect clearing arrangements through different omnibus models and individual segregated accounts which are further allowed. CCPs, clearing members and direct clients should have discretion with regard to which omnibus model will be offered. Thus, it should be clarified that offering only one omnibus model (net or gross) will comply with the requirements of the new RTS (while multiple omnibus models may also be offered at the same time).

However, with respect to the requirements in Articles 3 and 4 of the proposed RTS we would like to mention that only segregation models with separate position accounts either via individual segregated accounts or omnibus segregated accounts are able to support real time risk management. The provision of information to the CCP only once a day cannot cater for such real time risk management. Hence, the final RTS should be flexible enough to provide for future developments and should not prescribe structures with regards to providing information regarding customer positions between CCPs, Clearing Members and direct clients that might not be supported by the market or might not be economically reasonable.

It should be noted that as the Clearing Members will continue to be responsible for the positions and assets of the client and its clients following the default of the client, it is not essential for the protection of indirect clients' assets to have this information at the level of the CCP. However, as outlined in the Consultation Paper, if segregation should take place also at the level of the CCP, it is of essence that the information on individual client's positions necessary for the calculation of each client's margins is provided to the CCP in a transparent and prudent way.]

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_1>

Q2. Do you agree with the proposed approach for the requirements related to default management? Do you think there are alternative level 2 requirements (compatible with the relevant insolvency regime situations and the level 1 mandate) that would achieve better protections?

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_2>

[ESMA acknowledges the challenges in portability. The proposals in the Consultation Paper define default management, including porting, requirements for Clearing Members. Eurex Clearing agrees with the requirement that a Clearing Member shall commit to trigger the necessary procedures for transferring assets and positions held by the defaulting client for the account of the indirect client

including procedures to allow for a prompt liquidation. If porting is not an option for the indirect clients, it should be questioned what the added value of segregation provides.

It is important to note that the contractual relationships of most CCPs are with the Clearing Member and only certain disclosed clients, i.e. trading members (non-clearing members) and registered customers. The default of a Clearing Member's client is always the responsibility of the Clearing Member. This also holds true for the default of an indirect client. Eurex Clearing supports the proposal that comprehensive legal contractual relationships between the Clearing Members, clients and indirect clients need to be established. It is necessary to provide a comprehensive flow of information between these parties.]

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_2>

Q3. Do you agree that the proposed approach adequately addresses counterparty risk throughout the longer chain by ensuring an appropriate level of protection to indirect clients? If not, are there alternative approaches compatible with Level 1?

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_3>

[The chain of potential clearing arrangements implied by the Consultation Paper goes beyond the client / indirect client relationship including clients of indirect clients as well. As mentioned above the contractual arrangements of the CCP are with its Clearing Members and disclosed clients, trading members (non-clearing members) and registered customers. This will similarly be the case for clearing members who have a contractual relationship with their direct clients, but currently not with all indirect clients in the chain.]

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_3>

Q4. For longer chains, what other details (liquidation trigger and steps, flow and content of information, other) should be taken into account or what additional requirements or clarification should be provided in order to avoid potential difficulties when handling the default of a client or an indirect client facilitating clearing services?

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_4>

[Please see answer to question 3.]

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_4>

Q5. Do you consider that the new provision assigning by default to the indirect client the choice of an omnibus indirect account following reasonable efforts from the client to receive an instruction is appropriate? If not, what other considerations should be taken into account?

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_5>

[As outlined above it is important that the minimum requirements for segregation solution for indirect clients are flexible enough to be accepted by the market.]

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_5>

Q6. Do you consider appropriate that the collateral provided on top of the amount of margin the indirect client is called for is treated in accordance with the contractual arrangements?

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_6>

[Eurex Clearing has no comments.]

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_6>

Q7. In view of the different amendments described above, do you consider that this set of requirements ensures a level of protection with equivalent effect as referred to in Articles 39 and 48 of EMIR for indirect clients?

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_7>

[Please refer to our introductory comments and our answer to question 1.]

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_7>

Q8. Please indicate your answers to the cost-benefit survey?

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_8>

[Application of binary and inflexible indirect clearing requirements to ETD is likely to restrict widely used arrangements creating a barrier to trading and clearing as well as reducing liquidity. This could have a large impact on the access and quality of the markets. Additionally the costs associated with replicating the segregation of clients' positions and assets at the level of the CCP could be substantial for market participants.]

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_8>

Q9. Do you have any comments on the draft RTS under EMIR not already covered in the previous questions?

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_9>

[Eurex Clearing has no comments.]

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_9>

Q10. Do you have any comments on the draft RTS under MiFIR not already covered in the previous questions?

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_10>

[CCPs, clearing members and direct clients should have discretion with regard to which omnibus model will be offered. Thus, it should be clarified that offering only one omnibus model (net or gross) will comply with the requirements of the new RTS (while multiple omnibus models may also be offered at the same time). Regardless of this, the RTS should not prescribe a particular way as to how segregation has to be achieved on a functional level (i.e. by the use of segregated accounts versus reconciliation records to be forwarded from the client to the clearing member to the CCP). In this regard, CCPs, clearing members and clients should retain flexibility as to how they comply with the segregation requirements of the RTS. We believe that market competition is the better tool to achieve a suitable take-up of indirect clearing, compared to a prescribed set of statutory rules that may or may not meet future market demand.]

<ESMA_QUESTION_RTS_INDIRECT_CLEARING_10>