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From:	FR delegation
To:	Working Party on Financial Services and the Banking Union (EMIR/CCP) Financial Services Attachés

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Subject:	EMIR Review: working party 11.07.23 - French delegation non-paper on Operational Active Account (OAA)
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FR Non-paper – Requirement of an operational active account requirement in EMIR 3

1. **During the May 22 EMIR Council working party, many Member States have shown openness toward the FR-NL proposal on an Operational Active Account (OAA)**, either as a first best solution for the EMIR3 account requirement, or as a second best one (after the total deletion of the active account suggestion in the initial legislative proposal). The Swedish progress report qualifies this FR-NL proposal as one of the main bases for further discussions.
2. **In this context, it was deemed useful to provide for further details explaining how the OAA could be further framed already in level 1, hence helping an efficient supervision by national competent authorities.** It demonstrates that this new obligation is not the *status quo* (as explained in our previous paper, 5.part).
3. **The philosophy of the OAA is kept unchanged:** the aim is to ensure that
 - these accounts are operationally compatible with a quick boost (so that they can be a fall back plan if needed – see 3.(i) of our previous paper), and that ;
 - the account is permanently functional (so that they are not dormant and ensure the triggering of a market-led migration in the EU – see 3.(ii) of our previous paper).
4. **In this optic:**

- a. **EU counterparties in scope would be submitted to a mandatory requirement of demonstrating that they have the legal documentation, IT connectivity and internal processes associated to the account at the EU CCP in place.** The possibility of European market participants to clear all new trades to an EU CCP, if necessary, could be regularly stress-tested.
- b. **A key criterion to assess the operational nature of the OAA would be that the types of trades cleared in the OAA are representative, in terms of nature and characteristics, of the EU counterparty's types of IRD€ constitutive of its portfolio over a defined period.**

Take an EU counterparty whose IRD€ trades are cleared notably in a third country CCP. Over a defined period, these trades have different characteristics. **It could be different maturities of IRD€ trades as well as different types of IRD€.** With the OAA requirement, each type of IRD€ traded by the EU counterparty during a defined period should be represented within the trades cleared within the operational active account during this period.

Some EU counterparties may be in a situation whereby some IRD€ with one specific characteristic (one IRD€ maturity, one type of IRD€, ...) are exclusively traded with non-EU counterparties. To avoid an unlevel playing field situation whereby the EU counterparty would be compelled to request their non-EU counterparties to clear in the EU - and hence probably lose their capability to trade with them and/or loose market shares in a context where clearing in the EU will remain significantly costlier-, then this representativity requirement could be waived if the EU counterparty demonstrates to its NCA that IRD€ trades entered into with the concerned characteristics is only traded with non-EU counterparties.

⇒ **For example:**

- **Maturity:** the OAA would result in having EU counterparties trading IRD€ within a maturity range of **a, b, c** with other EU counterparties and **d**- maturity range IRD€ with non-EU counterparties over a period to be defined, being required to clear at least 1 of each **a, b c** maturity range IRD€ trades within the EU OAA.
- **Type of IRD€:** according to ESMA¹, there are 4 different types of OTC IRD€ under the clearing obligation (namely the Basis Swaps, the Fixed-to-float Swaps, the Forward Rate Agreements, the Overnight Index Swaps). Applying the very same logic, each type of IRD€ trades entered into by the EU counterparty with another EU counterparties should be reflected within the trades cleared in the EU mandatory account.

The parameters of the OAA (notably the period to be considered and the definition of maturity ranges) could be further detailed in level 2 by ESMA.

¹ [Public Register for the Clearing Obligation under EMIR \(europa.eu\)](https://public-register.ec.europa.eu/active-clearing/)

- c. For EU counterparties that would choose to keep an account at a UK CCP in addition to the EU CCP, they would be required to **regularly (tbd) report to NCAs their resources and systems in place to allow for a quick boost of the mandatory account**, if needed according to the UK regulation divergence risk and anticipated impact.

NB: In this non-paper, like in the previous one, we choose to focus only on the design of the mandatory EU account. We make the hypothesis that the scope of EU counterparties is left unchanged in comparison with the Commission's initial proposal. We also did not reflect on the calendar of implementation.