

The FOA has highlighted (in yellow) sections of ESMA's document for the purpose of commenting on those sections, and we have highlighted comments/new suggested text in turquoise.

Reporting to TRs – Transaction scenarios

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 EMIR¹;
- 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 – [also, any exemption to report (or non-coverage by the reporting obligation) 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)];

Comment: The highlighted wording is confusing. Article 1(4) EMIR exempts certain entities from EMIR. However, some of those entities would not have been financial counterparties or non-financial counterparties subject to obligations under EMIR (e.g. debt management offices are not financial counterparties and may not be "undertakings" and therefore will not be non-financial counterparties and the Bank of International Settlements is not established in the EU). It seems likely that it would have been intended to exempt transactions with entities listed in Article 1(4) from the reporting obligation (as well as the clearing and risk mitigation obligations) even if entered into with financial counterparties or non-financial counterparties.

- individuals 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 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 identity of the individual with whom it has concluded the transaction;
- delegation of reporting is a possibility under EMIR, including:
 - one counterparty delegates on the other counterparty;
 - one counterparty delegates on a third party;

¹ (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).

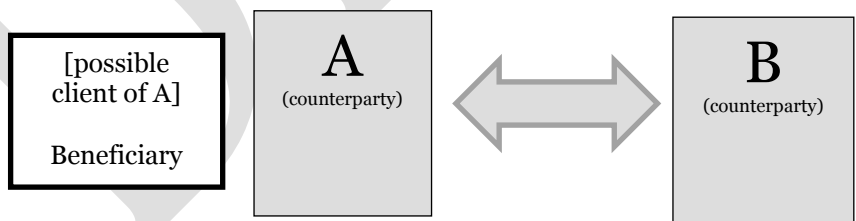
- both counterparties delegate on a single third party;
- both counterparties delegate on two different third parties;
- all the examples below will be compatible with any of the possibilities above in case the two counterparties do not report directly: following the principle of avoiding duplication and ensuring reporting, ESMA is favourable to centralised reporting (i.e. by the platform 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.

Comment: We agree that only the principals to a transaction are subject to a reporting obligation.

Even though the execution broker acts in a principal capacity, there is no reporting obligation on the execution broker at the time of execution because reporting only occurs once the trade has been allocated to the counterparties at the cleared transaction level (where trades are reported).

However, it would be helpful to clarify that the reporting party should always complete field 12 (trading capacity) with "P" (principal) since a reporting counterparty cannot be an agent. Where the reporting counterparty has used an agent to execute the transaction on its behalf, the agent's LEI should be given in field 8 (broker ID) and where it is using an agent to report the trade, the agent's LEI should be given in field 9 (reporting entity ID).

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.

Comment: A is contracting as principal with B. Therefore, if A wishes to pass the benefits of the transaction to its client, it enters into a separate back-to-back transaction with the client, which would require a separate report (see case 2).

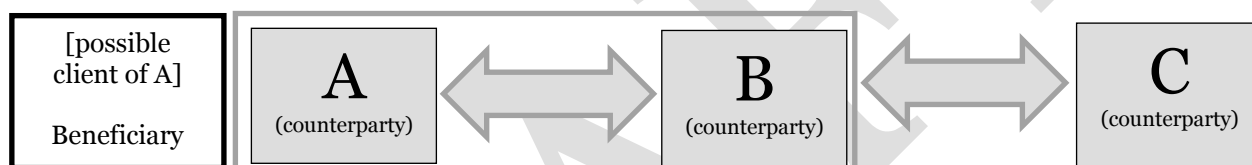
This would not be the case if A were contracting as trustee of a trust (e.g. a unit trust). There are two possibilities. A may obtain a separate LEI for the trust. In that case, it should not be necessary to complete the beneficiary field if A provides the LEI for the trust in field 2 (counterparty ID), since this will identify A and the structure.

Alternatively, A could provide its own LEI in field 2 and the LEI of the trust in field 11 (beneficiary ID).

It would be helpful to clarify other circumstances in which the beneficiary ID field should be used, bearing in mind that the reporting obligation falls on the principals to the transaction. Once the trade has been allocated (and cleared, if this is happening), the client that is the principal to the transaction will need to report the transaction and this will be a legal entity except in the case of a trust or similar arrangement (funds without legal personality).

If A is acting as agent for the beneficiary/client, it is the beneficiary/client which will need to report the transaction (see case 3).

Case 2: Principal trades in a chain

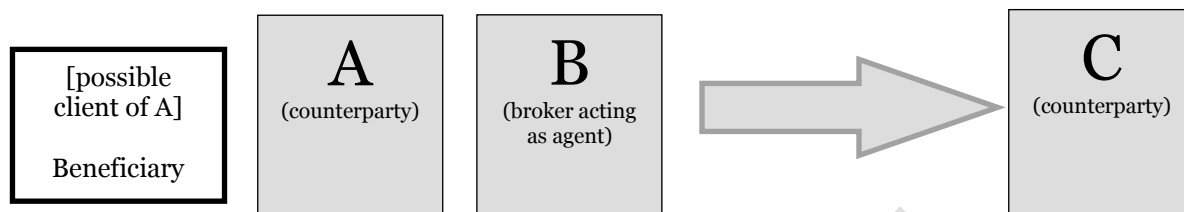


A is a client of B. They conclude a transaction that is back-to-back to another transaction that B is concluding with C.

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. – Comment: see above]

Case 4: Two counterparties executing a transaction in a venue

Two counterparties are executing a transaction in a venue. One is buying the derivatives and the other is selling them. The transaction is operated anonymously. This implies that members of the platform do not know each other.

Comment: As venue is applicable to OTC & ETD Firm A and H may or may not know each other, where they do (added green line) they will report each other as counterparty, where they do not they will report CCP D as their counterparty

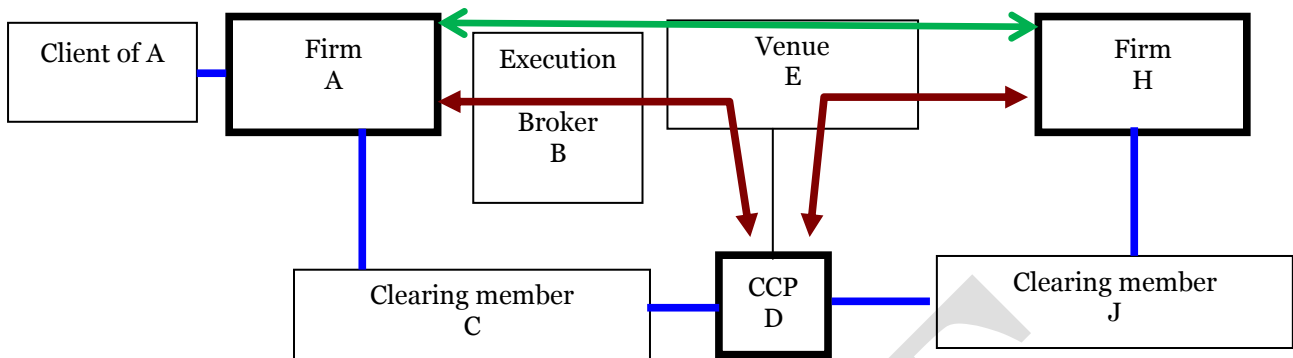
The executed trade is novated shortly afterwards (within the same trading day) by the CCP D. Following the novation, CCP D will have outstanding transactions with the counterparties' clearing members and not directly with the counterparties.

A is executing a transaction the beneficiary of which is one of its clients. A is acting through an execution broker B, who is a member of the platform. However, B is not a counterparty of the trade in this case, since it does not act as principal (only as agent of A, transmitting its order to the execution venue). The clearing of the trade for A, once concluded, is done through clearing member C.

Firm H is acting on own account, as principal, directly as a member of the market, and is clearing through clearing member J.

[Note: amend the diagram by deleting line joining A to CCP D and H to CCP D and replace with a line joining A and H representing the initial uncleared anonymous trade. The blue lines represent the trade after novation and clearing. At no point do A and H have a direct contractual relationship with CCP D.]

Comment: As venue is applicable to OTC and ETD transactions, Firm A and H may or may not know each other, where they do, (as counterparty to an OTC trade, added green line) they will report each other as counterparty, where they do not they will report CCP D as their counterparty.



Under this scenario, only one derivative is executed in the market. The transaction between Firm A (executed by broker B) and Firm H. Therefore, only 2 parties are obliged to ensure that the report to TR is made without duplication: A and H. However, when the transaction is cleared, CCP-D, clearing members C and J and firms A and H will be obliged to report the derivative contracts created between them as a result of the clearing. Other entities intervening in the trade as agent [deleted 'or in the clearing phase'] do not have any obligation to report (though, again, they could be used as reporting agents by any or all of the counterparties).

Given that Firm A and Firm H do not know each other, in accordance with Article 2(2) of Commission Delegated Regulation (EU) No 148/2013 (RTS on TR reporting), Firm A and Firm H would need to identify CCP D as their counterparty (even though at no time does CCP D have a contractual relationship with Firm A or H) and Firm A and H would report the transaction between them separately. [deleted last part of this para].

Comment: It is incorrect to say that the transactions between the CCP and the clearing member are not derivatives or that the transaction between the clearing member and its client are not derivatives. It is expected that clearing members are subject to reporting obligations for ETD which are similar to OTC.

Clearing of ETD trades is generally at T+0 and therefore reporting should be made only once clearing takes place, so the transaction will be reported directly as a cleared transaction. [deleted text here re execution timestamp, and that the trade id is expected to be assigned by the exchange]. Thus:

1. Firm A and Clearing Member C should report the transaction that is created between them.
2. CCP-D and Clearing Member C should report the transaction that is created between them.
3. Firm H and Clearing Member J should report the transaction that is created between them.
4. CCP-D and Clearing Member J should report the transaction that is created between them.

Even though the execution broker acts in a principal capacity, there is no reporting obligation on the executing broker at the time of execution because reporting only occurs once the trade has been allocated to the counterparties at the cleared transaction level (where trades are reported).

For the exceptional case (usually bilateral trades) in which clearing takes place after T+0 and after reporting, the reporting will originally be made as a trade between A and H except that where the counterparties do not know each other's identity they would still record the CCP D as their counterparty in accordance with Article 2(2) of the RTS and report separately even though this leads to submission of two sets of common data for the trade. Alternatively, where this is possible, the exchange may disclose the names of the counterparties to one another so that they can agree the common data and agree on a single report of common data. Clearing would be reported as a modification to the report, as provided in Article 2 of the RTS on Article 9 of EMIR and better described in the Q&A no.20.

The CCP could report on behalf of both [revisions made here] clearing members C and J, by sending two reports, one for the transaction with clearing member C and one for the transaction with J, to the TR. This should be agreed between the CCP and the clearing members in this case, i.e. C and J. The CCP cannot report the information about the transactions between the trading/clearing members and their clients as it does not have access to the information on this. The clearing members can report the transactions with their clients.

Further consideration will need to be made to reporting requirements where multiple indirect clearing relationships exist.

If Venue E and CCP D are outside the EU, then only those firms that are established in the EU (and are financial counterparties or non-financial counterparties) will be required to submit reports.

Lifecycle events

Following the clearing and allocation of the trades, ETD market participants do not monitor individual transactions but rather outstanding positions.

With respect to lifecycle events, the reporting could be on a net basis with respect to all the cleared transactions in aggregate (position level). However, further sales and purchases can be reported in the same way as the original trade.

CCPs can update their mark-to-market value by product and position (see above) but it will not be possible for them to provide mark-to-market values for individual transactions.

Changes to collateral values should be reported by reference to the portfolio number reported in field 24.

Modifications and terminations – the industry needs clarification on reporting obligations and counterparties initially and can then consider modification/termination.

Variation of case 4 – the two firms use the same clearing member

A variation to the previous case is presented below. In this case, the transaction is cleared through the same clearing member C.

CCP D does not record any exposure toward clearing member C, because the client account of C at the CCP is unchanged. However, the CCP receives a clearing instruction from Venue E, so it is aware that execution took place [see comment below] and even if it has no exposure to clearing member C, it is subject to the obligation under Article 9 of EMIR to ensure that the report to TR is made without duplications, given that the transaction is cleared, although from the clearing it does not result any exposure.

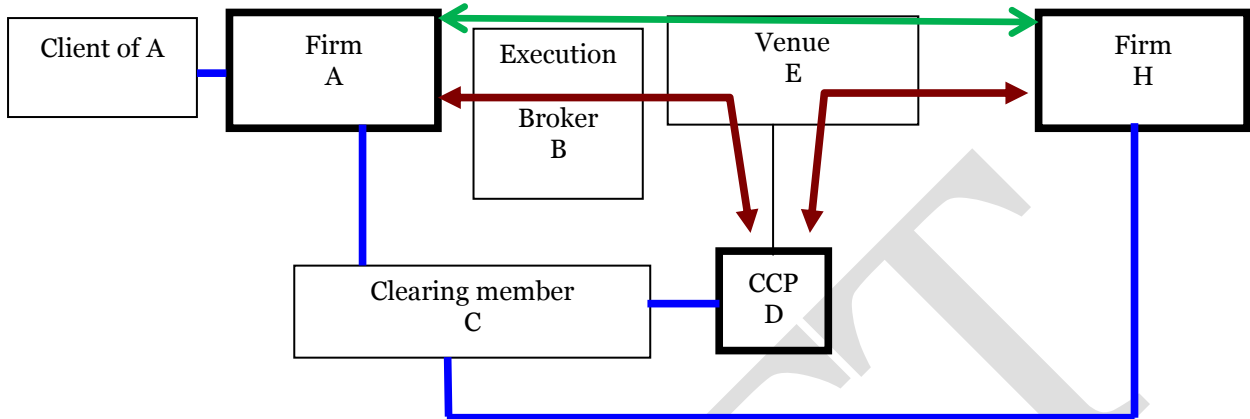
Comment: This is not always the case. A CCP will only be aware that execution took place if it has access to the trading front end, or if the transaction is automatically novated.

Given that Firm A and H do not know each other, they can also do not know that they are using the same clearing member. Therefore, as in the previous example the will report CCP D as their counterparty.

Comment: As venue is applicable to OTC & ETD, Firm A and H may or may not know each other. Where they do (added green line), they will report each other as counterparty, and where they do not they will report CCP D as their counterparty

The report will take place as for the previous example, with the addition that both H and A will indicate C as clearing member.

Clearing member C and CCP D should report additional transactions with each other if they record additional transactions in C's client account at the CCP even if these are offsetting.



Open offer

In some cases trading in venues is done under an open offer by the CCP, that becomes instantaneously the counterparty of any trade matched (executed) in the platform between two trading participants.

ESMA finds that under open offer it is not contemplated, as opposed to the case of novation, the previous existence of a “bilateral” trade that is later subject to novation. Therefore the CCP is acting from the start (from execution point) as the counterparty for the seller and the buyer.

This case does not present any peculiarity in terms of final reporting to a TR compared to the novation, since counterparties are the firms using a clearing member to have a contract celebrated between each of them and the CCP. These contracts should therefore be reported in the same manner as a cleared trades and the chart used above (Case 4) is also valid for the reporting of open offer cases.

Case 5: Give-up trades

In a give-up trade, a transaction that was originally conducted in a trading venue by an execution broker, is subsequently assigned (given-up) by the customer to another entity (clearing broker, clearing agent) for clearing with the CCP. The give-up implies that the relation with the CCP and the contract that will be kept with the CCP is established through a clearing broker/agent that is different from the one that executed the transaction.

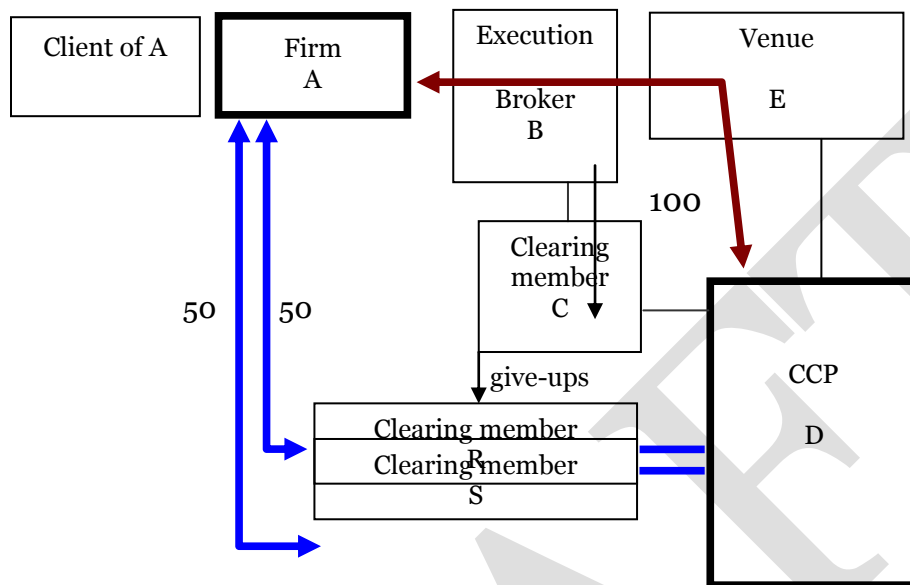
A give-up is mostly executed through a single clearing member, although a give-up can also occur between 2 clearing members. However, clearing members are not subject to EMIR reporting obligations; only CCPs and/or counterparties.

Comment: See above as regards the reporting obligations of clearing members.

In this case, a Client A of an executing broker B executes a transaction in a venue E for 100 and later gives instructions to the executing broker to give up the trade to two clearing members (R and S) for 50 each.

The executed contract is therefore transformed through the give-up in two contracts between the CCP and the Firm A, through 2 different clearing members. They will be held in two different portfolios (accounts) for the purpose of collateral and daily valuation.

Comment: Again, there is no contract between the CCP and Firm A. The trade between A and H is replaced by the transactions between the CCPs and the clearing members and the transactions between the clearing members and their clearing clients.



In this case, the reporting obligation lies on the same entities as under case 4: A and the CCP, since they are the only counterparties of the trade(s). The questions of who reports and what is reported, have the same answer as in case 4.

However, two key elements need to be clarified on this matter:

- i) how many reports should be sent to a TR; and
- ii) what information should be included in each report with respect to the clearing member, the notional and the trade identifier.

ESMA finds that one report should be sent, indicating as many clearing members as appropriate, with their corresponding amounts (e.g. 50). TRs are suggested to enable additional lines per field (e.g. CM1, CM2, CM3, ..., as appropriate).