



# Emir Disclosures

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## EMIR – Listed Derivatives Clearing

### Summary

The purpose of this document is to provide you with information about the Services offers on Listed Derivatives Clearing within the framework of the European Market Infrastructures Regulation (EMIR), and in relation to the Central CounterParty-ies (CCPs) where we act as General Clearing Member (GCM).

This document sets out the main considerations for clients in terms of account setup, legal implications, and costs, which clients should consider when making their clearing services choices.

Securities Services is a Listed Derivatives GCM of the following CCPs : LCH Clearnet Ltd, CC&G, Eurex Clearing, LCH Clearnet SA, ICE Europe, BME Clearing, NASDAQ OMX, ADECH, ASX Clear Futures, SGX DC, NZCL.

This communication is sent to you in compliance with Article 39.7 of EMIR:

*CCPs and clearing members shall publicly disclose the levels of protection and costs associated with the different levels of segregation that they provide and shall offer services on reasonable commercial terms. Details of the different levels of segregation shall include a description of the main legal implications of the respective levels of segregation offered including information on the insolvency law applicable in the relevant jurisdictions.*

**Effective date:** This document is applicable to our clearing services with each CCP as of the date that European Securities and Markets Authority (ESMA) approves the relevant CCP.



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## I. Definitions

It is important to note the following definitions in EMIR No 648/2012 (Article 2 – Definitions):

- ‘CCP’ means a “legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer.”
- ‘clearing member’ means “an undertaking which participates in a CCP and which is responsible for discharging the financial obligations arising from that participation.”
- ‘client’ means an “undertaking with a contractual relationship with a clearing member of a CCP which enables that undertaking to clear its transactions with that CCP.”

Definitions:

- Indirect client: an indirect client is a customer of a client of a clearing member (customer of a client for whom Securities Services act as GCM).

## II. Account structures

### EMIR Requirements

Article 39.4: A clearing member shall keep separate records and accounts that enable it to distinguish, both in its accounts held with the CCP and in its own accounts, its own assets and positions from the assets and positions held for its clients at the CCP.



Article 39.5: *A clearing member shall offer its clients, at least, the choice between omnibus client segregation and individual client segregation and inform them of the costs and level of protection referred to in paragraph 7 associated with each option. The client shall confirm its choice in writing.*

### Securities Services answer

We will be offering our clients at least two segregation models per CCP, one omnibus client segregation model (OSA) and one individual client segregation model (ISA).

To the extent that we were to clear for our own account, our own positions and collateral associated with the margins would be held in a separate House account with the CCP in Securities Services books and at CCP level. Currently we do not engage in any House activities.

#### OSA:

- OSA stands for Omnibus client Segregation Account structure.
- This is the existing account structure used by Securities Services with all CCPs where we act as GCM. The majority of CCPs do not require further tests with clients if they opt for OSA.
- In this model:
  - Clients' positions are segregated at CCP level at least from House activities, and potentially per Client, depending on CCP.
  - Collateral associated with the margins is held in an omnibus account at CCP level.
  - Clients' positions and collateral associated with the margins are segregated in Securities Services books.
  - We are not required to post any excess margin (amount of assets we require from you that is above the amount of assets the CCP requires from us) to the CCP.
- OSA can be either OSA Gross or OSA Net:
  - With OSA Net, margin results from a net position of all clients positions recorded in the omnibus account.
  - With OSA Gross, margin is the sum of each individual client's margin.
  - Depending on the CCP, OSA Gross or OSA Net model is used (cf section VI).

#### ISA:

- ISA stands for Individual client Segregation Account structure.
- In this model, positions and collateral associated with the margins are segregated in the client's name in Securities Services books and at CCP level.
- As a matter of principle, we will be required to post excess margin to the CCP.
- In this model, we will not be able to perform any collateral transformation when posting collateral at the CCP.
- Since it is a new model, full end to end testing and further documentation will be required for clients wishing to move to an ISA structure.
- Extra cost will be incurred from the GCM and the CCP.



Note :

- All CCP on which Securities Services acts as a GCM, have not been approved by ESMA yet, meaning that those two segregation models and the below schema may be adapted to match their models.

### Account structures overview :

From one CCP to the other following account structures may be proposed to GCM :

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### III. Portability

#### EMIR Requirements

Article 48.5: *Where assets and positions are recorded in the records and accounts of a CCP as being held for the account of a defaulting clearing member's clients in accordance with Article 39(2), the CCP shall, at least, contractually commit itself to trigger the procedures for the transfer of the assets and positions held by the defaulting clearing member for the account of its clients to another clearing member designated by all of those clients, on their request and without the consent of the defaulting clearing member.*

Article 48.6: *Where assets and positions are recorded in the records and accounts of a CCP as being held for the account of a defaulting clearing member's client in accordance with Article 39(3), the CCP shall, at least, contractually commit itself to trigger the procedures for the transfer of the assets and positions held by the defaulting clearing member for the account of the client to another clearing member designated by the client, on the client's request and without the consent of the defaulting clearing member. That other clearing member shall be obliged to accept these assets and positions only where it has previously entered into a contractual relationship with the client by which it has committed itself to do so. If the transfer to that other clearing member has not taken place for any reason within a predefined transfer period specified in its operating rules, the CCP may take all steps permitted by its rules to actively manage its risks in relation to those positions, including liquidating the assets and positions held by the defaulting clearing member for the account of the client.*

#### Additional information

- Events of default are defined by each CCP. In the event of default of the GCM, and only in that case, it is possible under certain conditions, to port positions and collateral to a back-up GCM or, at some CCPs and in some circumstances, to become direct member of the relevant CCP.
- Both OSA and ISA segregation models allow portability.
- No partial portability is allowed.
- No transfer of positions without transfer of collateral is possible.
- Portability is not automatic. It will be mandatory for you to contact the CCPs in case of default of the GCM.
- Portability may be achieved only towards a Clearing Member of the same CCP.
- The back-up GCM may refuse the positions and associated collateral. Achieving a transfer is not guaranteed by CCPs, regardless of your segregation model.
- With OSA Net, portability will only be possible in practice if all clients choose the same back-up GCM. If not, open positions will be closed out.
- With OSA Gross, portability may be achieved where the above conditions are met, but it is not necessary for all clients of the defaulting GCM to choose the same backup GCM (except with Eurex Clearing where portability is treated as an OSA Net structure).



## Securities Services answer

- Depending on the CCP, we will offer OSA Net or OSA Gross and ISA segregation models, and portability will be possible as per the above conditions.

### IV. Collateral: title transfer or security interest

As is market practice and subject to applicable laws, we will decide the basis on which we will accept collateral from you. This will be set out in the clearing agreement entered into between us. The provision of collateral may be made either under title transfer or under a security interest arrangement.

- Under a title transfer collateral arrangement, when you transfer assets to us, we become the full owner of such assets. You bear a credit risk on us with respect to such obligation. This means that if we were to fail, unless we are declared to be in default by the CCP, you will have no right of recourse to the CCP or to any assets that we transfer to the CCP and you will instead have a claim against our estate for a return of the assets along with all our other general creditors. Even if we are declared to be in default by the CCP, the extent of your rights in relation to the CCP, if any, will depend on the particular CCP.
- Under a security interest arrangement, when you transfer assets to us, you retain full ownership of such assets. Such assets are transferred to us on the basis that the assets still belong to you, but you have granted us the right to appropriate these assets in the event of your default. We will require a right of use from you in order to be able to redeposit the assets with the CCP. Once we exercise the right of use, (e.g. by posting the assets to a CCP), the assets will cease to belong to you and in effect become our asset, at which point you will bear our credit risk in a similar way to the title transfer arrangements.



## V. Indirect Clearing

### EMIR Requirements

Article 4 Clearing Obligation (for OTC Derivatives): *In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the contracts that are considered to have a direct, substantial and foreseeable effect within the Union or the cases where it is necessary or appropriate to prevent the evasion of any provision of this Regulation as referred to in paragraph 1(a)(v), and the types of indirect contractual arrangements that meet the conditions referred to in the second subparagraph of paragraph 3.*

Article 5.2 (of Regulatory Technical Standards No 149/2013): *A client that provides indirect clearing services shall request the clearing member to open a segregated account at the CCP. The account shall be for the exclusive purpose of holding the assets and positions of its indirect clients.*

### Additional information



- In case of default of the client, the GCM must allow the transfer of positions of indirect client to another client or Clearing Member.
- The CCP does not need to know who the indirect clients are.
- If the GCM defaults and if portability is requested by the client, the client and its clients have to be ported together to the same back-up GCM.
- To offer segregation to the Indirect Client, the Direct Client must be under the ISA model.

### Securities Services answer

The Indirect Clearing Model is mandatory only for OTC Derivatives. However if the CCP supports the Indirect Clearing Model for Listed Derivatives, we will also support the model as GCM

Please see table in section VI to know which CCPs support this model.



## VI. Securities Services offers

CCPs	OSA Gross	OSA Net	ISA	Indirect Clearing
LCH Clearnet Ltd	TBC	TBC	Yes	TBC
ICE Europe	TBC	TBC	Yes	TBC
CC&G	TBC	TBC	Yes	TBC
Eurex Clearing	Yes	Yes	Yes	Yes
LCH Clearnet SA	Yes	Yes	Yes	Yes
BME Clearing	TBC	TBC	Yes	TBC
NASDAQ OMX	No	Yes	Yes	Yes
ADECH	TBC	TBC	Yes	TBC
ASX Clear Futures	TBC	TBC	Yes	TBC
SGX DC	TBC	TBC	Yes	TBC
NZCL	TBC	TBC	Yes	TBC

## VII. Main insolvency consideration

### General insolvency risks

If we enter into insolvency proceedings, you may not receive all of your assets back or retain the benefit of your positions and there are likely to be time delays and costs (e.g. funding costs and legal fees) connected with recovering those assets. These risks arise in relation to both Individual Client Accounts and Omnibus Client Accounts because:

- except for CCP-specific porting solutions described earlier and the comments below under “*Margin rights*”, you will not have any rights directly against the CCP; and you will only have contractual claims against us (i.e. rather than being able to recover particular assets as owner);
- our insolvency proceedings are most likely to be a version of a process called *redressement judiciaire* (administration) although it is possible for us to enter into liquidation and other proceedings. In administration, subject to a few exceptions, you will not be able to take any action against us without court or insolvency official consent (which can be a time consuming process with an uncertain outcome);





- in addition to the insolvency proceedings set out above, as a French credit institution, we may be subject to other measures taken by the French supervisory authority (please see “*French Reorganisation Banking Act (Loi de séparation et de régulation des activités bancaires 2013)*”) and
- any stage of a cleared transaction (e.g. client transactions, CCP transactions and porting) may be challenged by our insolvency official if, broadly speaking, it was not on arm’s length terms. If successful, the court has broad powers to unwind or vary all of those stages.

Please note that:

- insolvency law may override the terms of contractual agreements, so you should consider the legal framework as well as the terms of disclosures and legal agreements;
- a large part of your protection comes from CCP arrangements and the legal regimes surrounding them. Therefore, you should understand these in order to evaluate the level of protection that you have on our default. It is important that you review the relevant disclosures by the CCP in this respect; and
- we are licensed as a credit institution and incorporated under French law and in accordance with EU law, most of our insolvency-related questions will be determined by French law. Additionally:
  - in relatively limited cases, foreign courts will take insolvency jurisdiction even in relation to foreign branches of French companies; and
  - the interaction of key default issues – e.g. porting, recovery of assets, close-out netting and other insolvency matters – are likely to be determined by a combination of French law, the law of the country of the branch where we operate from and the law of the location of any collateral.

We suggest that you take legal advice on the interaction of these legal systems because it is beyond the scope of this disclosure.

Please also note that we may act through branches not located in the EU. In certain circumstances, such branches could be subject to insolvency proceedings governed by the applicable laws in force locally or the law of another jurisdiction determined in accordance with such applicable laws.

The interaction of laws related to key default issues – e.g. porting, recovery of assets, close-out netting and other insolvency matters – are complex and will require careful analysis of applicable conflicts of law rules in all relevant jurisdictions.



## Insolvency of CCPs and others

Except as set out in this section “*Insolvency of CCPs and others*”, this disclosure deals only with our insolvency. You may also not receive all of your assets back or retain the benefit of your positions if other parties in the clearing structure default – e.g. the CCP itself, a custodian or a settlement agent.

In relation to CCP insolvency, broadly speaking our (and therefore your) rights will depend on the law of the country in which the CCP is incorporated and the specific protections that the CCP has put in place. You should review the relevant CCP disclosures carefully in this respect and take legal advice to fully understand the risks in this scenario.

In addition, please note the following:

- we expect that an insolvency official will be appointed to manage the CCP. Our rights against the CCP will depend on the relevant insolvency law and/or that official;
- it will be difficult or impossible to port CCP transactions and related margin, so it would be reasonable to expect that they will be terminated at CCP level. The steps, timing, level of control and risks relating to that process will depend on the CCP, its rules and the relevant insolvency law. However, it is likely that there will be material delay and uncertainty around when and how much assets or cash we will receive back from the CCP. Subject to the bullet points below, it is likely that we will only receive back only a percentage of assets available depending on the overall assets and liabilities of the CCP;
- it is unlikely that you will have a direct claim against the CCP because you do not have any contractual relationship with the CCP;
- under the client clearing agreement, client transactions will terminate at the same time as the matching CCP transactions unless the relevant CCP rules provide otherwise. This will result in a net sum owing between you and us. However, your claims against us are limited recourse so that you will only receive amounts from us in relation to client transactions if we receive equivalent amounts from the CCP in relation to relevant CCP transactions;
- if recovery of margin in this scenario is important, then you should explore “bankruptcy remote” or “physical segregation” structures offered by some CCPs. These tend to be offered only in relation to Individual Client Accounts and generally involve either:
  - you or us retaining assets in your/our name and only giving a security interest over that margin to the CCP (i.e. it allows the CCP to apply margin if we default but should keep the assets out of the CCP's insolvency if it defaults); or
  - the CCP holding the assets in a blocked or controlled margin account and giving a security interest (or similar legal right) over the margin back to us, to you and/or to a trustee on our behalf.



It is beyond the scope of this disclosure to analyse such options but your due diligence on them should include analysis of matters such as whether other creditors of the type described in “Porting – preferential creditors” below will have priority claims to margin; whether margin or positions on one account could be applied against margin or positions on another account (notwithstanding the contractual agreement in the CCP’s rules); the likely time needed to recover margin; whether the margin will be recovered as assets or cash equivalent; and any likely challenges to the legal effectiveness of the structure (especially as a result of the CCP’s insolvency).

### Margin rights

If you provide assets to us by way of security interest (with or without title transfer) and we have not exercised a right of use over those assets, then you should have a legal right to recover the balance of those assets (after settling your obligations to us) ahead of other creditors. However, please note that, depending on the exact set up of our security arrangements, it may be that some preferential creditors will still have a prior claim to your assets (please see “Porting – preferential creditors” below which deals with a similar point).

If you have retained the assets (e.g. in a custody account over which you have given us a security interest) then you will have the best chance of recovering them. If you have transferred the assets to our name by way of security (e.g. by giving us a charge over the assets) then you bear more risk if there is a shortfall in any of the assets that we are holding. Generally speaking, your risk of loss will be highest in relation to cash margin, lower in relation to securities held by us in an omnibus account; and lower still if securities are segregated in our books and records.

The actual result will be highly fact specific and will depend on, amongst other things, the exact terms of our legal arrangements; how we have operated accounts; and claims that other intermediaries (e.g. custodians and settlement systems) have to those assets.

### French Monetary and Financial Code, Book IV, Title IV

You should note the relevant provisions of the French Monetary and Financial Code which apply in case of insolvency proceedings instituted against us:

- no creditor and no insolvency official may avail itself of any right whatsoever over margin deposits you made with us to cover or guarantee positions taken on a market in financial instruments, even on the basis of Book VI of the French Commercial Code, and
- a CCP may transfer to another member positions and related margin deposits you made with us, or may take any other action it deems appropriate to limit its risks exposure, such as liquidation of the assets and positions held by us on your behalf, and
- in the event of our default, any surplus available following the management by the CCP will be repaid to you or if you are not known to the CCP, to us for your account



Such provisions focus on protecting counterparties from our default. It is not clear that it would provide any wider protection – eg. if the CCP itself became insolvent.

Please note that the French Monetary and Financial Code, Book IV, Title IV is a complex piece of legislation and its provisions may be subject to different interpretation and this summary is not a substitute for detailed legal analysis – particularly in the context of the relevant CCP’s regulatory authorisations and default rules - with your professional advisors.

Please also note that the provisions of the French Monetary and Financial Code may not be recognised by foreign courts or insolvency officials.

The protection is from insolvency law so will not necessarily help, for example, with the issue described under “*Porting – preferential creditors*” below because that relates, at least in part, to security law.

### Close-out netting

If we default and the CCP cannot port the CCP transactions and collateral (e.g. because a back-up clearing broker cannot be found) then we would expect it to terminate and net our CCP transactions and apply related assets.

You and we would want this to work differently from normal bilateral close-out netting that would apply to all positions and assets between us and the CCP – e.g. assets on an Individual Client Account relating to you could be netted with our house or another client account at the CCP.

There is a risk that this netting across accounts could happen automatically as a result of ordinary applicable insolvency law.

A similar risk occurs between us and you in relation to client transactions.

We understand that industry-wide legal opinions are being prepared on the effectiveness of close-out provisions in standard client clearing agreements and their annexes. You should seek legal advice and/or access to such opinions for more information in this respect because the interaction of key issues – e.g., applicable insolvency law, contractual governing law – are complex and will require careful analysis of applicable conflicts of law rules in all relevant jurisdictions.

### Porting – prohibition

As mentioned above, except in specific (e.g. physically segregated) structures, a CCP only owes us (not you) obligations in relation to CCP transactions and related assets.

As a result, when these contracts and assets are transferred to a back-up clearing member, there is a risk of insolvency challenge because our rights have effectively been taken from us on or around the time of our insolvency. Applicable laws may not permit



this and there is a risk that the courts may therefore not permit, or may unwind, any porting and related client transactions with your back-up clearing member.

### Porting - preferential creditors

A CCP's porting structure may be based on or supported by a security interest. This can take different forms but generally involves us creating security over our rights against the CCP in relation to an Individual Client Account or Omnibus Client account in your favour or in favour of another person (e.g. an independent trustee) to hold the security on your behalf. Broadly speaking, the security interest should support the argument that these assets are not part of our insolvency estate (i.e. are not to be shared with our other creditors).

However, depending on the exact structure, insolvency law gives certain statutory creditors priority over secured creditors. This means that some creditors may have a claim on client account assets ahead of you. Statutory creditors are likely to include, amongst others, our insolvency official (e.g. in respect of its costs and expenses), a relatively small amount of unsecured creditors, some employee salaries and pension contributions.



### Mismatch of CCP/Client transactions and assets

It could be that our net assets in relation to CCP transactions do not match our net obligations to each other in relation to the matching client transactions. This can slow down or make porting impossible either operationally or legally.

For example, in an Omnibus Client Account it may occur at CCP level that assets in respect of CCP transactions related to you are used to cover losses in CCP transactions related to another client, with the result that there are insufficient assets available for porting to satisfy our obligations to you in relation to the client transactions.

Alternatively, it could be that all of your client transactions with us are netted automatically as a result of applicable insolvency law (please see above under “*Close-out netting*”).

### French Reorganisation Banking Act 2013 (*Loi de séparation et de régulation des activités bancaires 2013*)

The French Reorganisation Banking Act applies to BNP Paribas Securities Services as a French credit establishment. In serious circumstances, the *Autorité de contrôle prudentiel et de résolution* (ACPR, i.e. the French relevant supervisory authority) may decide a transfer of all or part of our assets and liabilities to a third party. In that case, your counterparty and/or your counterparty risk may change. It is unlikely that you will be able to stop such transfer or to enforce any early termination rights against us as a result of such transfer.



## VIII. Cost implications

Because of the legal, operational and system impacts that an ISA account setup and running has, additional costs, on top of the already agreed clearing fees, can be charged by the CCP and the GCM.

### CCP costs

Those costs are publicly disclosed by the CCP and will be charged by the CCP to the GCM. As GCM we will pass these costs to our clients.

### Securities Services costs

For all clients wishing to move to an ISA structure, we will charge some extra costs, on top of the existing clearing fees and in addition to the CCP costs that will be passed on to you.



## **Clients choices**

Clients may at any time send us a letter asking for a change of account setup on any CCP.

### **Important notice:**

Unless you request a change of account structure in writing, Securities Services will continue to maintain the existing account structure we currently have in place for you.





## Appendix

- ESMA – EMIR:  
<http://www.esma.europa.eu/page/European-Market-Infrastructure-Regulation-EMIR>
- L1: Level 1 of EMIR, namely Regulation (EU) No 648/2012 of the European Parliament of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0001:0059:EN:PDF>
- L2: Level 2 of EMIR, being Commission Delegated Regulations supplementing Regulation (EU) No 648/2012 with regard to regulatory technical standards.  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:052:FULL:EN:PDF>

**Action required:** for action.

**Should you require any further information, please do not hesitate to contact your BNP Paribas client service team.**

## Disclaimer

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