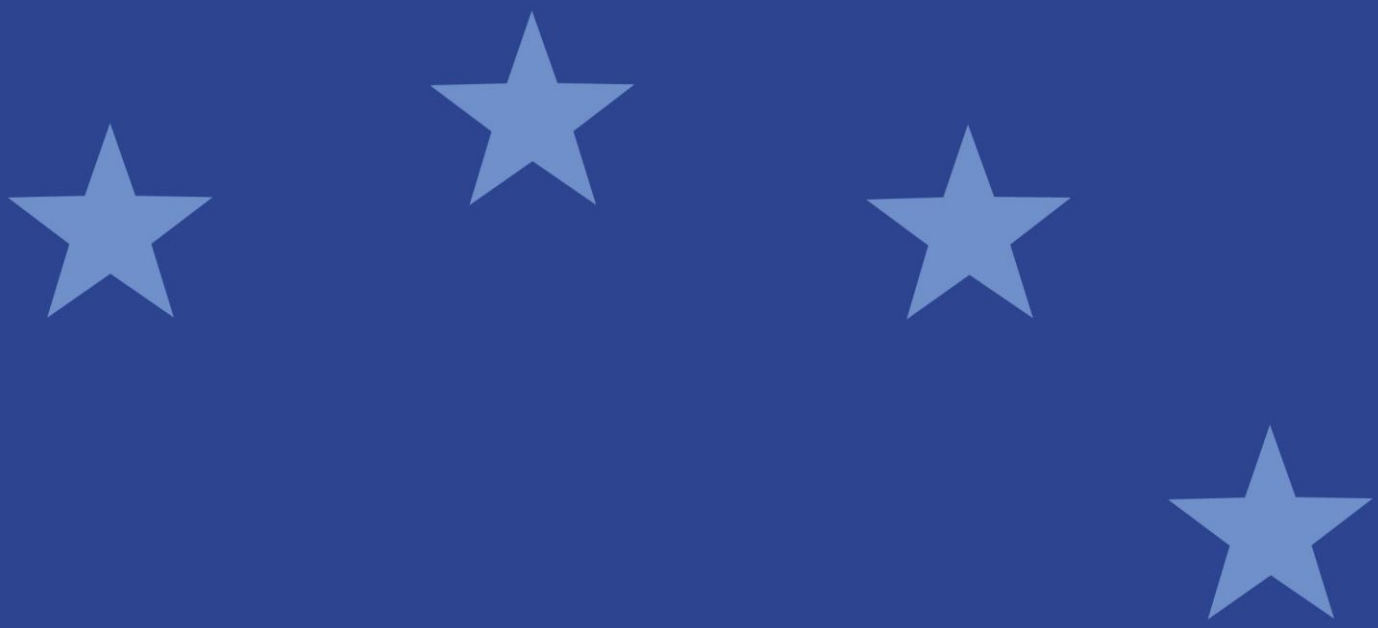
esma European Securities and Markets Authority

Response Form to the Consultation Paper

Technical Advice on Comparable Compliance under article 25a of EMIR



28 May 2019 | ESMA70-151-2379

Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex III. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **29 July 2019.**

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

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.

2. Please do not remove tags of the type <ESMA_QUESTION_TACC_1>. Your response to each question has to be framed by the two tags corresponding to the question.

3. If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.

4. When you have drafted your response, name your response form according to the following convention: ESMA_TACC_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_TACC_ABCD_RESPONSEFORM.

5. Upload the form containing your responses, in Word format, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open consultations" → "Consultation on Position limits and position management in commodities derivatives").

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.

Who should read this paper

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from central counterparties (CCPs), clearing members and clients of clearing members.

General information about respondent

Name of the company / organisation	Eurex Clearing AG
Activity	Central Counterparty
Are you representing an association?	☐
Country/Region	Germany

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_TACC_1>

Eurex Clearing AG, as part of Deutsche Boerse Group welcomes the opportunity to comment on the three consultations which ESMA has issued. This is one of three responses, which should be seen as a single and consistent approach across the related consultations.

In this context, we believe that the assessment of the tiering criteria and the comparable compliance guidance should be read holistically, and ultimately depends on the third country approach the EU supervisors wishes to develop. As our response to the Tiering Consultation highlights, we consider that perceived tensions in the approach to comparable compliance in this consultation arises out of ambiguity on the context of three distinct Tiers established in EMIR 2.2.

We recall that the European Commission outlined that Tier 2 is seen as an increased compliance burden for those CCPs deemed of "such systemic importance that they require additional conditions to mitigate potential risks", but that "If this is not sufficient […] CCP will only be able to provide some or all of its services in the Union if it is established in the EU."

As such, we would assume that the number of possible candidates for Tier 2 is limited. We would also highlight that "additional conditions" are already foreseen by the policy makers to have their limitations. This reflected in the consultation, which already anticipates and outlines that certain EMIR articles or RTS will not be possible or reasonable to assume all Third Countries to apply. As such, we would advise a broad and outcome based reading of EMIR comparability. We consider this suitable as this both avoids generating unnecessary tensions with Third Countries, and reflects the legislation which notes that such measures would not be sufficient to address certain scale of systemicity. In particular, it is not likely that the inclusion of elements of dual-supervision will be able to address the broader potential concern for

offshoring of Union economic activity, nor would it provide the certainty of control or in-crisis powers should systemic risk be at stake.

We would also stress that reciprocity and regulatory cooperation with Third Country authorities should be considered, including where they relate to the ability of EU CCPs to offer their services to Third Countries.

Finally, in order to support the highest uptake of the G20 reforms and a level playing field globally, the Principles for Financial Market Infrastructures (PFMIs) should be seen as minimum requirements to access EU markets, and not only a pre-requisite for Tier 1 CCPs. <ESMA_COMMENT_TACC_1>

Questions

Q1 : Do you agree on the overall approach proposed for ESMA's assessment for comparable compliance? What other considerations should be reflected in the assessment for comparable compliance?

<ESMA_QUESTION_TACC_1>
Yes, we agree with the overall approach for assessment of comparable compliance. We would highlight that for a Third Country Tier 2 CCP, ESMA should consider those requirements which relate most closely to the sound and continued operation of nearly critical or systemic EU markets with stricter evaluation.
<ESMA_QUESTION_TACC_1>

Q2 : Do you agree that ESMA should accept a requirement in a third country as comparable to a corresponding requirement under EMIR where it is assessed to be, on an outcome basis, equal or at least as strict or conservative as, the corresponding requirement under EMIR?

<ESMA_QUESTION_TACC_2>
Generally, we agree. However, we would highlight the importance of reserving an effective export of EMIR standards to those CCPs and markets which are critical or systemic to the EU. In our view, Tier 2 CCPs should be the exception, rather than the rule. And if cases are identified where CCPs are neither Tier 1, nor systemic or critical enough in EU markets for relocation/de-recognition, then it is commensurate that a higher standard of attention to impact and similarity of standards with respect to the EU is ensured.
<ESMA_QUESTION_TACC_2>

Q3 : Do you agree that the minimum elements to be specified in the Commission's delegated act should include the core provisions listed in Table 1? What other considerations should be included as minimum elements of the assessment?

<ESMA_QUESTION_TACC_3>
We agree with the list proposed, and do not have further additions.
<ESMA_QUESTION_TACC_3>

Q4 : Do you agree that, where a third country requirement can be on average, but not always, equal or at least as strict or conservative as the core provisions listed in Table 1, it can still be accepted as comparable provided that the Tier 2 CCP adopts the corresponding EMIR requirement as a floor or minimum requirement, through adequate rules, policies and procedures?

<ESMA_QUESTION_TACC_4>
Yes, we agree that this is a suitable approach, provided that such information is publicly available, and the acknowledgment that changing the CCPs rules, policies and procedures that achieved this objective could modify the comparability determination.
<ESMA_QUESTION_TACC_4>

Q5 : Do you agree that, when a third country requirement is similar but not always equal or at least as strict or conservative as, the provisions not included in the minimum elements and listed in Table 2, it can still be considered to be comparable where it

substantially achieves the respective regulatory objectives in accordance with the guidance specified in Table 2?

<ESMA_QUESTION_TACC_5>
Yes, we consider this to be suitable flexibility that would otherwise be particularly difficult to overcome. We also consider that the preceding equivalence decision on the jurisdiction to be a suitable time to consider that such differences are suitably covered and addressed. We would highlight our concern that certain information which must be public for EU CCPs, but not necessarily so for Third Country Tier 2 CCPs could, for critical EU markets, create an unlevel playing field. For such matters, we would consider it important for ESMA and the European Commission to carefully consider such matters prior to approval and Tiering decision of the CCP.
<ESMA_QUESTION_TACC_5>

Q6 : Do you agree on the modalities and conditions proposed for conducting the assessment for comparable compliance? What other considerations should be included in such modalities and conditions?

<ESMA_QUESTION_TACC_6>
Yes, we generally agree with the modalities and conditions proposed. For the sake of completeness, it may be useful for authorities to outline the possibility of a CCP moving from Tier 2 to Tier 1, and moving from Tier 2 to relocation/de-recognition.
<ESMA_QUESTION_TACC_6>

Q7 : Do you agree that the CCP reasoned request shall include (i) the mapping of the requirements under EMIR for which comparable compliance is requested against the requirements in the third country, whereby each relevant article of EMIR and related RTS (paragraph by paragraph) should be mapped with the corresponding requirement in the third country achieving the same regulatory objective, and (ii) per each mapped requirement, the reason why compliance with a requirement in the third country satisfies the corresponding requirement under EMIR?

<ESMA_QUESTION_TACC_7>
Yes, we agree with the approach outlined in 4.3.
<ESMA_QUESTION_TACC_7>

Q8 : Do you agree that ESMA may also request the CCP to include in its reasoned request (i) an opinion of the third country supervisory authority on the accuracy of the representation of the requirements applying in the third country, (ii) where necessary, a certified translation of relevant requirements in the third country, and (iii) a legal opinion confirming the accuracy of the mapping provided?

<ESMA_QUESTION_TACC_8>
Yes, we agree.
<ESMA_QUESTION_TACC_8>

Q9 : Do you agree on the cost benefit analysis annexed to the draft technical advice? Are there other considerations to be reflected in the cost benefit analysis?

<ESMA_QUESTION_TACC_9>
We generally agree with the cost benefit analysis. However, we would highlight that this is primarily a procedural costs/benefit comparison of the application and ongoing compliance. It does not in itself consider the broader costs and benefits for the EU on the basis of the type and scale of EU market available at a Third Country CCP. We recognise the scope of the consultation, but would urge considering that these

matters should be addressed prior to placing a Third Country CCP into its particular Tier.
<ESMA_QUESTION_TACC_9>