European Securities and Markets Authority

Response Form to the Consultation Paper

Draft technical advice on criteria for tiering under Article 25(2a) of EMIR2.2

28 May 2019 ESMA70-151-2372

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_TATC_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_TATC_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_TATC_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 AGEurex Clearing AGEurex Clearing AG
Activity	Central CounterpartyCentral CounterpartyCentral Counterparty
Are you representing an association?	☐
Country/Region	GermanyGermanyGermany

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_TATC_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.

We appreciate the efforts expanded on existing and ongoing equivalence determinations while also recognising the necessity to enhance the Third Country framework across EU financial services legislation. The approach undertaken in EMIR 2.2. is a suitable approach in that it enables EU regulators to distinguish between CCPs, rather than apply a one-size-fits-all treatment. In our view, the advantages that can be derived from the framework, if applied appropriately in practice, are twofold:

1. Third country CCPs from well-regulated jurisdictions are able to efficiently and with minimal regulatory burden able to offer their services to EU-based members and clients.

2. The EU is able to measure, manage, and ultimately prevent the offshoring of clearing of important EU markets in systemic scale.

This distinction enables the EU to both promote international trading while preventing circumstances that could lead to fiscal dumping or crisis management concerns. Achieving this, however, requires a policy and regulatory view on what constitutes a systemic or critical EU market, and the degree to which it may be centrally cleared offshore before constituting either a concern for undue external location of EU economic activity, or systemic risk concerns. If such a view is missing, the EMIR 2.2 Third Country approach could result in a suboptimal situation in which Third Country CCPs must effectively choose to accept a burdensome dual regulation or forego offering their services directly into the EU.

This outlines our primary concern with the approach that appears to underlie the consultation. The consultation appears to take the view that many, if not most, Third Country CCPs may be candidates for Tier 2, and that Tier 2 CCPs may only offer their services into the EU provided they meet -at least- EMIR standards. Such an approach is unsatisfactory as it creates tensions with Third Country authorities through an implicit export of EMIR, while also failing to prevent systemic offshore clearing formation in critical EU markets. Hence, in our view, the consultation outcome should reflect the approach enabled by EMIR 2.2 of three distinct cases for Third Country CCPs;

- Tier 1 – non-systemic scale of EU markets, or truly Third Country markets, are offered into the EU through a light equivalence process.
- Tier 2 – an EU market which for exceptional circumstances requires greater regulatory oversight from the EU, but is not sufficiently important to be relocated/de-recognised.
- Tier 2+ – EU markets of systemic scale where the oversight provided by Tier 2 is unsuitable to address concerns of such markets existing offshore.

Beyond this principal point, we agree with the overall approach to determine which CCP belongs into which Tier based on indicators. We consider the identification of CCPs of interest to be a suitable way forward in terms of regulatory cooperation. We would note that the CFTC, for instance, has recently issued their proposals for determining a certain form of tiering. These are a much simpler and direct approach. The holistic approach outlined in the consultation paper has the advantage of being both future proof and flexible by considering the aspects of a CCP jointly rather than relying on a fixed metric. However, we would highlight certain challenges with the indicator list as created:

- The indicator list would benefit from being clearly contextualised within the three Tier structure of EMIR 2.2. This approach enables the standard or level achieved for the relevant indicator(s) to be better judged in relation to the Tiering of the CCP.The indicators are comprehensive, and while all could form part of an assessment, there are in practice likely to be aspects of CCPs which are more important than others.
- Certain indicators may be important in understanding a functioning of a particular CCP, but their relation to systemicity is unclear. Similarly, some criteria should be seen as minimum requirements to request access to EU markets such as adherence to the Principles for Financial Market Infrastructures (PFMIs) to support the highest uptake of the G20 reforms and a level playing field globally.
- Following from these three points, it may be interesting to consider whether particular key indicators emerge, and if these are suitable to quantitative thresholds.
- We would also highlight that the questionnaire template to CCPs appears to be more detailed and specific than the criteria.

Beyond these general remarks, we have provided specific answers to the questions, and remain at your availability for any further requests. <ESMA_COMMENT_TATC_1>

Questions

Q1 : Do you generally agree with the proposed indicators (Indicators 1, 2, 3, 4 and 5) to further assess the nature, size and complexity of the CCP's business? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA_QUESTION_TATC_1>

Yes, we generally agree with the proposed indicators 1, 2, 3, 4, 5. We would suggest the following, however:

We consider the criteria on international guidance or the PFMIs as a minimum requirement to apply for access to EU markets for all Third Country CCPs, rather than an indicator of systemicity.

To the relative importance of the indicators: Indicator 2 and 3 are in our view the key ones – and the importance of the other indicators only arise if a particular EU market of interest is identified. As such, we would propose that this Indicator be considered first, or with a greater weight than the others.

To Indicator 2: the relevance of each financial instrument should be considered holistically and relative to the overall market. For example, some markets are fundamental regarding monetary policy, or directly impact the ability of government to manage their debt. Note that we question the value of the ‘level of standardization of contractual terms’ (bullet point 4) when assessing the systemic relevance of a CCP. Both simple and complex contractual terms can be found in markets with key criticality or systemicity with an EU nexus. For instance, sovereign CDS and futures on government debt both have a bearing on public sector debt management, but diverge in terms of their complexity.

To Indicator 3: the relative value of open interest in a particular market segment or asset class to the overall size of the CCP does not appear to be that relevant. It is more important what the size of the particular market segment or asset class is in its own right, or relative to overall global or EU clearing. We do however think that indicator 3 is a very useful way to consider the systemicity of a CCP, in particular by considering its importance in terms of:

- **Flow** measured as the cleared volume or notional/nominal cleared; relative to full market, and relative to onshore EU market.
- **Stock** measured as the open interest or notional/nominal amounts outstanding); relative to full market, and relative to onshore EU market.

Comparatively, indicators 1 and 4 appear less determinant for financial stability, although we appreciate they may be of interest in judging the holistic configuration of a CCP.

To Indicator 1: though the interconnectedness of a CCP with other FMIs may be relevant from a risk contagion point of view, the systemic nature of these FMIs or the nature of their link (as per indicator 14) would be an important factor to assess, rather than their mere existence. Similarly, the ownership structure may provide a useful indicator regarding potential conflicts of interest, AML/CTF concerns or where profits are collected, but are difficult in themselves to relate to the systemic relevance of a CCP.

To Indicator 4: similarly, the transparency and liquidity of a relevant market are useful indicators to understand the market structure and price formation process but add limited value for assessing the systemic relevance of a market.

<ESMA_QUESTION_TATC_1>

Q2 : How would you envisage ESMA to consider risks and in particular cyber-risks in relation to the evaluation of systemic importance?

<ESMA_QUESTION_TATC_2>
For both risks, and cyber risks, we would posit that these are well covered by indicators other than 5, as well as the context of such tiering decisions. The reference to PFMI compliance and the overall EU equivalence determination which precedes a tiering decision are a strong framework to assess this. We hope that this clarifies the distinction between a tiering decision on the criticality or not of a particular market and its scale, versus the subsequent choice of modularity for addressing it (deference to the Third Country, direct EU supervision, relocation/de-recognition).
<ESMA_QUESTION_TATC_2>

Q3 : Do you generally agree with the proposed indicators (Indicators 6, 7, 8 and 9) to further assess the effect of a failure or disruption of the CCP? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA_QUESTION_TATC_3>
Yes, we generally agree with the proposed indicators 6, 7, 8, 9. We would however suggest that these criteria (numbers 6, 7, and 8 of which are eminently suitable to indicate scale of particular EU markets) could benefit from non-binding and flexible quantitative thresholds. These would help add clarity to ESMA's assessment, whilst ensuring sufficient discretion. In addition to the measurement of the **flow** and **stock** by indicator 3 we would suggest considering:

- **Risk** measured in Value at Risk (VAR), Initial Margin (IM) or Supervisory Stress Test terms relative to total market, and relative onshore EU market
- (Union currency) **Liquidity** measured in average variation margin (VM) flows and potential stressed VM flows.

To Indicator 6: Regarding the Initial Margin assessment (bullet point 3), we would suggest that special attention be given to IM confidence intervals, stress scenario sensitivity and margins period of risk (MPOR) for Union currency denominated markets.

To Indicator 7: We would also recommend assessing the robustness of Union currency liquidity arrangements. Tier 2 category should be deemed inappropriate otherwise.

To Indicator 9: we would suggest that the effect of a market closure or cessation of clearing based on the strength or weaknesses of the recovery and resolution plan should hold a high weight in any consideration of tiering. In addition, EU authorities should be greatly interested in the potential for state aid, and the effect this may have on the Third Country CCP. Note that the ‘maximum liability for an individual CM’ may not always be known in advance, for instance, a CM may wish to commit further resources on a voluntary basis as it values the continuity of the clearing service, their portfolio may lose value without legal limitation, or be requested by the home Resolution Authority to absorb additional losses.

<ESMA_QUESTION_TATC_3>

Q4 : Do you generally agree with the proposed indicators (Indicators 10 and 11) to further assess the CCP’s clearing membership structure? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA_QUESTION_TATC_4>
While there can be good reasons to consider the CCP’s clearing membership structure, we do not consider this an essential feature in its own right. If other indicators have already captured the absolute and relative size of a Third Country CCP in a particular EU market, then the degree to which EU clients contribute to the overall CCP itself is not in our view a necessary indicator for tiering. The participation of EU firms to a Third Country markets are a natural consideration for their home regulators, and the home regulator of the Third Country CCP, but no in our view for ESMA (EU markets Supervisor)
<ESMA_QUESTION_TATC_4>

Q5 : Do you generally agree with the proposed indicator (Indicator 12) to further assess alternative clearing services? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA_QUESTION_TATC_5>
Yes, we generally agree with the proposed indicator 12. We would however highlight that we are not convinced that substitutability is a particularly useful indicator of systemic scale or criticality. A Third Country CCP may be systemic in EU markets even if there is no EU CCP which is substitutable. Equally, a unique offering by a Third Country CCP need not be systemic or critical. We appreciate that for mandatory clearing this may differ.
<ESMA_QUESTION_TATC_5>

Q6 : Do you generally agree with the proposed indicators (Indicators 13 and 14) to further assess relationships, interdependencies, or other interactions? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

<ESMA_QUESTION_TATC_6>

Yes, we generally agree with the proposed indicators 13 and 14.

<ESMA_QUESTION_TATC_6>

Q7 : Do you identify other benefits and costs not mentioned above associated to the proposed approach (option 3)? If you advocated for a different approach, how would it impact this section on the impact assessment? Please provide details.

<ESMA_QUESTION_TATC_7>

Though we would support Policy Option 2 for its clarity and discretionary character, we understand the concerns around the risk of providing an incomplete picture. Therefore, we support Policy Option 3 chosen by ESMA but would recommend providing further clarity as to how these would be applied, notably by prioritizing the indicators between critical and indicative. Given the benefits of such an approach, we would welcome sufficient resources and authority be granted to ESMA for it to be able to tackle such issues.

<ESMA_QUESTION_TATC_7>