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	U.S. Chamber of Commerce, Center for Capital Markets Competitiveness
Activity	Other Financial service providers
Are you representing an association?	☒
Country/Region	North-America

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_TATC_1>

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness (CCMC) appreciates the opportunity to comment on ESMA's draft technical advice on criteria for tiering under Article 25(2a) of EMIR 2.2. The European Union is an integral component of the world's capital markets. A strong EU Capital Markets Union with effective and workable regulation will ensure the EU remains competitive, while preserving EU counterparties' ability to do business with third countries and keeping costs low for EU investors.

While we understand the need to protect against financial stability risks posed to the European Union, we caution against extraterritorially imposing EU regulation on third countries, which could lead to market fragmentation.

The Board of the International Organization of Securities Commission (IOSCO) published in June a report on "Market Fragmentation & Cross-Border Regulation," In the report, IOSCO acknowledges that "The use of deference and the tools associated with this concept (e.g., passporting, substituted compliance, recognition/equivalence)…can contribute to mitigating the risk of fragmentation for global cross-border markets."[1]

IOSCO also acknowledged the U.S. Commodity Futures Trading Commission's (CFTC) recent expansion of its application of deference to non-U.S. entities. The report notes, "the CFTC has exempted four non-US [central counterparties] CCPs from CFTC registration as a derivatives clearing organization (DCO) to allow the clearing of proprietary trades for US persons. In addition, the CFTC has created a substituted compliance framework for CCPs registered with

[1] IOSCO, "Market Fragmentation & Cross-Border Regulation," June, 2019, page 26: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD629.pdf.

the CFTC and also authorized in the EU to facilitate the harmonization of cross-border activities by minimizing the application of duplicative and inconsistent regulations between the CFTC and EU CCP regimes. The CFTC is continuing to explore how it can further defer to non-US authorities in the supervision of non-US CCPs that do not pose a significant risk to the US financial markets.28 The CFTC also has issued several deference decisions to other jurisdictions regarding margin requirements and trading venues."[2]

ESMA Chairman Steven Maijoor referenced the IOSCO report at the CFTC MRAC Subcommittee meeting on June 12, 2019, noting that the increased use of equivalence, mutual recognition, substituted compliance, and passporting has benefited efficiency in the financial markets. He added that reliance on home country regulation is important to avoid market fragmentation. We agree and appreciate the Chairman's support of this report.

However, we are concerned that the amendments to EMIR would not adequately rely on home country regulation and could lead to market fragmentation and increased costs for EU market participants.

The amendments to EMIR would give ESMA the discretion to impose EU rules directly on CCPs in jurisdctions that have already been determined to have equivalent regulatory frameworks. Application of duplicative, and in many cases conflicting rules to the entirety of a third country CCP's global clearing activities would increase the cost of clearing globally, likely reduce the number of CCPs willing to serve the EU markets, and result in reduced liquidity for EU customers. The cost of clearing would be higher because the over-the-counter (OTC) derivatives contracts subject to the EMIR clearing obligation would need to be cleared in a less liquid EU market. This extra cost would likely be passed on by the CCPs to their clients. EU counterparties using non-EU markets would not be able to use non-qualifying CCPs because the capital costs of facing such a CCP would be uneconomical.

U.S. lawmakers and market participants expressed many of these concerns at a Congressional hearing held by the U.S. House Agriculture Committee, Subcommittee on Commodity Exchanges, Energy, and Credit on June 26, 2019. Subcommittee Ranking Member Austin Scott (R-GA) cautioned that EMIR 2.2 could result in conflicts and legal uncertainty, leading to less liquidity and more risk. Subcommittee Chairman David Scott (D-GA) echoed concerns regarding the potential dangers to the U.S. financial industry.

We encourage ESMA to ensure the amendments to EMIR are properly calibrated to avoid any unintended consequences which would restrict market participants' access to third country service providers and lead to market fragmentation.

<ESMA_COMMENT_TATC_1>

[2] IOSCO, "Market Fragmentation & Cross-Border Regulation," June, 2019, page 17: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD629.pdf.

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>
In the draft technical advice, ESMA states that when assessing the risk profile of a third country CCP, it will consider “the nature, size and complexity of the CCP’s business in the Union, and outside the Union [emphasis added].” Specifically, in Indicator 3, ESMA notes that the value and volume cleared by the CCP will be assessed globally—not just based on the value cleared in EU currencies or for EU clients. We believe that in order to assess whether a CCP is systemically important to the EU, ESMA should focus on a third country CCP’s EU clearing business rather than the CCP’s overall size. If a third country CCP does not have significant exposure to the EU markets or EU clients, it should not be designated as a Tier 2 CCP.
<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?

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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>
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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>
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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>
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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.

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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>
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