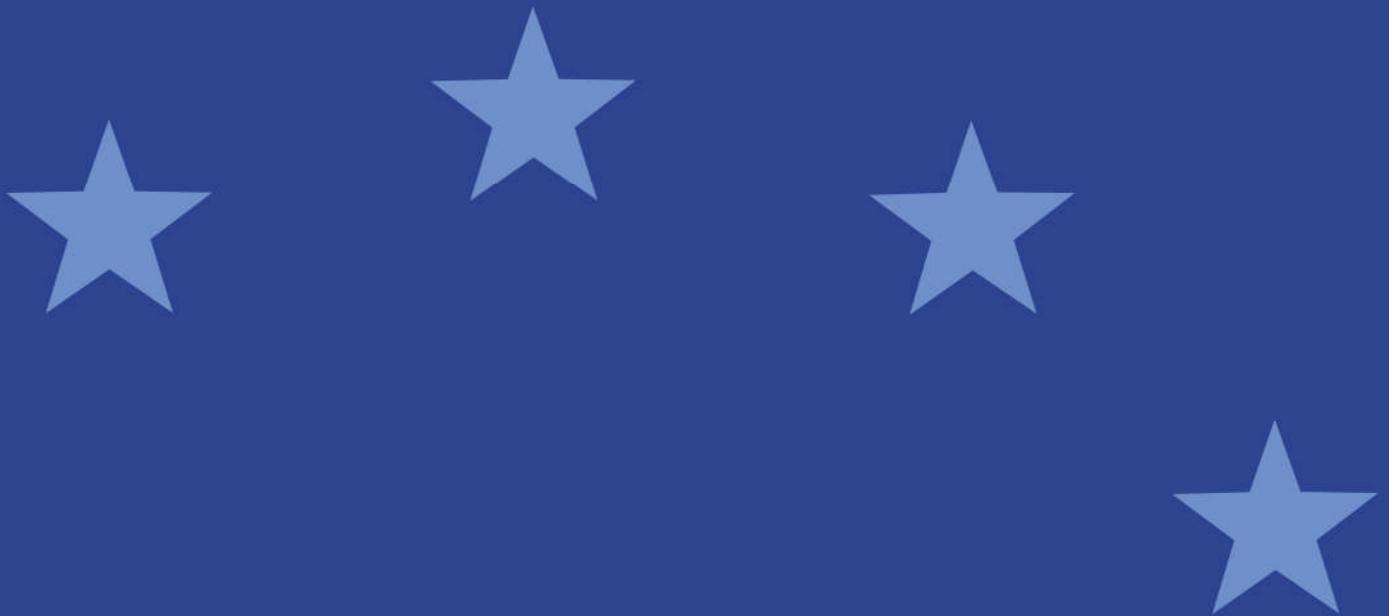




European Securities and
Markets Authority

Response Form to the Consultation Paper

Technical Advice on Comparable Compliance under article 25a of EMIR



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	U.S. Chamber of Commerce, Center for Capital Markets Competitiveness
Activity	Other Financial service providers
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	North-America

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_TACC_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 jurisdictions 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_TACC_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 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>

In the draft technical advice, ESMA notes that the comparable compliance assessment will be a “detailed comparative analysis of the requirements applying in the third country against the EMIR requirements on a requirement-by-requirement basis.” We are concerned that this approach is overly granular and may not capture the comprehensive impact of the U.S. regulatory regime.

Specifically, we disagree with the construct of identifying minimum elements, i.e., core provisions, that need to be satisfied by corresponding regulatory provisions applying in the third country in order for the third country to be deemed as “comparable.” This overly granular approach does not allow for a true comparability assessment and instead creates a framework for ESMA to directly apply the requirements of EMIR to third country CCPs. Indeed, in the draft technical advice, ESMA notes that if it does not deem a third country's requirement to be “as strict as” or “as conservative as” the core provisions, the third country CCP would have to “adopt the corresponding EMIR requirement as a floor or minimum” in order to be deemed comparable. Moreover, the “as conservative as” threshold applies to the core provisions at all times, essentially requiring the application of EMIR requirements even when the third country regulations are more conservative overall. Given the subjectivity around the terms “as conservative as” and “as strict as,” ESMA would have significant discretion regarding when to apply EMIR requirements directly to third country CCPs.

At the recent CFTC MRAC Subcommittee meeting, Chairman Maijoor noted that it will not be necessary for third country CCPs to have identical requirements to the EU regulation. He further noted that ESMA will work with local regulators to understand the regulatory environment and how the regulations work in the home country. We appreciate these comments and encourage ESMA to utilize an outcomes-based approach in the comparable compliance assessment..<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>

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<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>

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<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>

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<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>

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<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>

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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>

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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>
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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?

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