

# Consultation Paper

Draft Technical advice to the European Commission on fees charged to Tier 1  
Third-Country CCPs under EMIR



## Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. 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 **8 December 2023**.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Your input - Consultations'.

### **Publication of responses**

All contributions received will be published following the close of the consultation period, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly 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](http://www.esma.europa.eu) under the heading '[Data protection](#)'.

### **Who should read this paper?**

This consultation is looking for feedback from third-country CCPs, market participants and authorities.

## Table of Contents

1	Executive Summary .....	5
2	Background .....	7
2.1	Fees charged by ESMA to TC-CCPs .....	7
2.2	Necessary changes to the current approach for Tier 1 CCPs .....	9
3	Proposed changes to the annual fees charged to Tier 1 CCPs.....	11
3.1	Allocation of fees based on weighted turnover .....	11
3.2	Minimum and maximum annual fees per category.....	14
3.3	Default fee for CCPs failing to submit audited figures.....	15
4	Annexes .....	17
4.1	Annex I - Summary of questions.....	17
4.2	Annex II – proposed draft amendments to the Fees Delegated Regulation .....	18
4.3	Annex III – initial mandate to provide a technical advice.....	20

# 1 Executive Summary

## Reasons for publication

In accordance with Article 25d of Regulation (EU) No 648/2012<sup>1</sup> ('EMIR'), ESMA charges fees to CCPs established in third countries (TC-CCPs) which apply for recognition or have been recognized under Article 25 of EMIR. These fees shall be proportionate to the CCP's turnover and cover all costs incurred by ESMA for the recognition and the performance of its tasks in accordance with EMIR.

Following a Technical Advice from ESMA<sup>2</sup>, on 14 July 2020 the European Commission adopted Commission Delegated Regulation (EU) 2020/1302<sup>3</sup> ("Delegated Regulation (EU) 2020/1302" or "the Fees Delegated Regulation"), which further specifies the type of fees, the matters for which they are due, the amount of the fees and the manner in which they are to be paid by Tier 1 and Tier 2 CCPs.

ESMA has started collecting fees from TC-CCPs in 2020. Reflecting ESMA's experience of applying the Fees Delegated Regulation in practice, ESMA is updating its Technical Advice to the European Commission, to highlight areas where the Fees Delegated Regulation may be revised in order to ensure a more proportionate approach in calculating the fees for Tier 1 CCPs, in particular with a view to more accurately reflect the considerable differences in size and activity across Tier 1 CCPs, as well as their degree of interconnectedness with Union entities and currencies.

This Consultation Paper is published to seek stakeholder's input on ESMA's proposal to revise the Commission Delegated Regulation (EU) 2020/1302 in relation to Tier 1 CCPs' fees.

## Contents

This Consultation Paper presents the main proposals to be included in an ESMA's updated Technical Advice to the European Commission on the revision of Delegated Regulation (EU) 2020/1302. Section 2 explains the relevant background for this Technical Advice. Section 3 sets out ESMA's proposals to review the fees framework and account for the differences among Tier 1 CCPs, and the related costs incurred by ESMA.

---

<sup>1</sup> OJ L 201, 27.7.2012, p.1-59

<sup>2</sup> [ESMA70-151-2650 Final Report on a Technical advice on ESMA fees for TC CCPs under EMIR 2.2](#)

<sup>3</sup> OJ L 305, 21.9.2020, p.1-6

**Next Steps**

The deadline for the submission of responses to this Consultation Paper is 8 December 2023. ESMA will then consider the feedback received and submit its Technical Advice to the European Commission.

## 2 Background

### 2.1 Fees charged by ESMA to TC-CCPs

1. Following the revisions to EMIR introduced by Regulation (EU) 2019/2099<sup>4</sup> ('EMIR 2.2'), ESMA is required to charge fees to CCPs established in third countries recognised or applying for recognition pursuant to Article 25 of EMIR. In this regard, Article 25d of EMIR provides that:

*"1. ESMA shall charge the following fees to CCPs established in a third country in accordance with this Regulation and in accordance with the delegated act adopted pursuant to paragraph 3:*

*(a) fees associated with applications for recognition pursuant to Article 25;*

*(b) annual fees associated with ESMA's tasks in accordance with this Regulation in relation to the CCPs recognised in accordance with Article 25.*

*2. The fees referred to in paragraph 1 shall be proportionate to the turnover of the CCP concerned and shall cover all costs incurred by ESMA for the recognition and the performance of its tasks in accordance with this Regulation."*

2. In accordance with paragraph 3 of Article 25d of EMIR:

*"3. The Commission shall adopt a delegated act in accordance with Article 82 in order to specify further the following:*

*(a) the type of fees;*

*(b) the matters for which fees are due;*

*(c) the amount of the fees;*

*(d) the manner in which fees are to be paid by the following:*

*(i) a CCP which applies for recognition;*

*(ii) a recognised CCP classified as a Tier 1 CCP in accordance with Article 25(2);*

---

<sup>4</sup> OJ L 322, 12.12.2019, p. 1–44

*(iii) a recognised CCP classified as a Tier 2 CCP in accordance with Article 25(2b).*

3. Accordingly, and following a Technical Advice from ESMA issued on 11 November 2019, the European Commission adopted on 14 July 2020 the Fees Delegated Regulation.

#### *Recognition fee*

4. Article 1(1) of the Fees Delegated Regulation establishes a basic recognition fee of EUR 50,000 for any TC-CCP that applies for recognition under EMIR. This basic recognition fee is applicable only once, and in accordance with Article 6(1) of the Fees Delegated Regulation shall be paid when the CCP submits its application for recognition. The recognition fee shall not be reimbursed in accordance with Article 6(3) of the Fees Delegated Regulation, regardless of the outcome of ESMA's assessment under Article 25 of EMIR.
5. In addition, where in accordance with Article 25(2a) of EMIR ESMA determines that an applicant CCP or an already recognised CCP is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States (i.e. a 'Tier 2 CCP'), the applicant CCP shall pay an additional recognition fee of EUR 360,000.

#### *Annual fees*

6. Furthermore, TC-CCPs which are recognised under Article 25 of EMIR are required to pay an annual fee, which differs depending on whether the CCP has been determined as systemically important ('Tier 2 CCP') or not ('Tier 1 CCP').
7. For Tier 1 CCPs, Article 2(2) of the Fees Delegated Regulation establishes a flat annual fee structure based on the total estimate of expenditure relating to the tasks performed by ESMA with regards to all Tier 1 CCPs, divided by the number of recognised Tier 1 CCPs.

*"2. Where a CCP is recognised by ESMA in accordance with Article 25(2) of Regulation (EU) No 648/2012 ('Tier 1 CCP'), the annual fee for each Tier 1 CCP for a given year (n) shall be the total annual fee divided in equal parts between all Tier 1 CCPs recognised on 31 December of the previous year (n-1).*

*For the purposes of the first subparagraph, the total annual fee for a given year (n) shall be the estimate of expenditure relating to the tasks to be performed by ESMA with regard to all recognised Tier 1 CCPs under Regulation (EU) No 648/2012 as included in ESMA's budget for that year.*



8. For Tier 2 CCPs, Article 2(3) of the Fees Delegated Regulation introduces a more proportionate system whereby the total annual fee shall be based on the estimate of expenditure for Tier 2 CCP supervision divided by the number of recognised Tier 2 CCPs, which is then weighted based on their annual global revenues from clearing fees and services pursuant to Article 4 of the Fees Delegated Regulation.

*“3. Where a CCP is recognised by ESMA in accordance with Article 25(2b) of Regulation (EU) No 648/2012 (‘Tier 2 CCP’), the annual fee for a given year (n) shall be the total annual fee divided between all Tier 2 CCPs recognised on 31 December of the previous year (n-1) and multiplied by the applicable weight determined pursuant to Article 4 of this Regulation.*

*For the purposes of the first subparagraph, the total annual fee for a given year (n) shall be the estimate of expenditure relating to the tasks to be performed by ESMA with regard to all recognised Tier 2 CCPs under Regulation (EU) No 648/2012 as included in ESMA’s budget for that year.*

## **2.2 Necessary changes to the current approach for Tier 1 CCPs**

9. The framework set out in the Fees Delegated Regulation relies on a cost-based fee collection from the industry, and therefore the fees collected from Tier 1 CCPs correspond directly to the overall expenses linked to the conduct of Tier 1 CCPs related ESMA tasks.
10. Nevertheless, the current structure of Tier 1 CCPs fees, which distributes estimated costs equally across all Tier 1 CCPs (i.e. “distributed structure” and not broken down according to their respective turnover figures), does not reflect the considerable differences in size and activity across Tier 1 CCPs, including their degree of relevance for the European Union, and therefore the different level of ESMA scrutiny required from one Tier 1 CCP to the other.
11. Indeed, pursuant to Article 25 of EMIR, ESMA is required to monitor Tier 1 CCPs, including scrutiny depending on the nature and size of its EU related activities as well as legal and regulatory and supervisory developments in third-country jurisdictions for which the European Commission has adopted equivalence decisions.
12. ESMA’s degree of scrutiny depends on the size and importance of the Tier 1 CCP’s activities overall and in relation to the European Union (e.g. number of clearing members established in the EU or belonging to EU groups, of EU trading venues, of interoperable CCPs and volume of EU currencies cleared). In effect, ESMA monitors on a more frequent

basis and in much more depth Tier 1 CCPs with multiple EU entities directly connected or which clear products denominated in European Union currencies.

13. However, the current distributed approach does not allow ESMA to adapt the fees to support necessary resources for the level of required scrutiny by ESMA on a given Tier 1 CCP, and therefore is not enough proportionate. Indeed, smaller Tier 1 CCPs, with less links with the EU and requiring less monitoring from ESMA, pay a disproportionately high level of fees compared to the actual costs incurred by ESMA.
14. In addition, the current fee structure provides limited flexibility for ESMA to adapt to a changing market, political and regulatory environment, such as the loss of equivalence, the identification of strategic deficiencies in the third country's anti-money laundering and counter financing of terrorism regime or a deeper market structure change, which may require a withdrawal of recognition for a Tier 1 CCP. Indeed, following such event under the current framework, all Tier 1 CCPs would be subject to a parallel increase of their annual fees (as the overall fee level would have to be distributed among a more limited number of Tier 1 CCPs).
15. In practice, this means that any increase in fees could become economically unbearable for many smaller Tier 1 CCPs with more limited revenues. Due to the equally-split structure, the acceptability of such increase is therefore limited, as smaller Tier 1 CCPs would be in a difficult position to meet the additional costs, while failing to understand the rationale for such increase, due to their limited size and impact on the EU.
16. Considering all of the above, a review of the fee structure for Tier 1 CCPs should therefore aim to provide for a more proportionate approach to better reflect the costs of ESMA's tasks related to a given Tier 1 CCPs.

### 3 Proposed changes to the annual fees charged to Tier 1 CCPs

17. Considering the above, ESMA therefore, proposes that the structure of the annual fee for Tier 1 CCPs be revised, in view of introducing a more proportionate approach via a weighting factor based on the global turnover of each Tier 1 CCP as stated in EMIR. For the avoidance of, doubt, ESMA proposes to leave the recognition fee under Article 1 of the Fees Delegated Regulation unchanged.

#### 3.1 Allocation of fees based on weighted turnover

18. Pursuant to Article 25d(2) of EMIR the fees shall be proportionate to the turnover of each concerned CCP. Accordingly, in order to introduce a more proportionate approach with regards to the turnover of Tier 1 CCPs, and reflect the difference of scrutiny required for Tier 1 CCPs of different sizes and risk profiles, ESMA proposes to allocate the annual fees among Tier 1 CCPs, *via* a weighting factor which would depend on the global turnover of Tier 1 CCPs, based on audited figures, as it is currently done for Tier 2 CCPs.
19. While there is no perfect parameter to measure a CCP's importance, ESMA finds that the annual global clearing revenues as a measure of the turnover of the Tier 1 CCPs to be a good proxy to measure the amount and value of a clearing service to its participants (i.e. how much participants are willing to pay for a given service), as well as the number of members connected (i.e. how popular or essential is a given service).
20. ESMA had considered the possibility of measuring the 'EU turnover' of Tier 1 CCPs, i.e. the share of the Tier 1 CCP revenues linked to EU related clearing to focus on the relation to the EU and thus the specific monitoring ESMA would need to perform. However, this approach would be inconsistent with what is currently foreseen by the Fees Delegated Regulation for Tier 2 CCPs and it would be difficult, if not impossible, to measure, for example because clients of clearing members are most often unknown by the CCP and their activities generally comingled in omnibus accounts, which the CCP alone cannot identify. Conversely, a measure of the 'EU turnover' without including the share of activity resulting from client clearing would provide an incomplete and skewed view of the relevance of the Tier 1 CCP for the European Union. ESMA therefore decided not to pursue this approach and instead to support a greater alignment with the fees calculated for Tier 2 CCPs based on the assumption that the bigger the overall activity the more global the CCP and thus the bigger the relation and potential impact to the EU.

21. Under this approach, Tier 1 CCPs would be allocated in multiple groups (3) based on their global clearing revenues. All Tier 1 CCPs belonging to the same group would pay the same annual fee.
22. Each group would be associated with a weighting factor, which would ensure that the fees ratio between different groups remains constant, independently of the number of CCPs per group, and of the total ESMA's costs.
23. ESMA suggests considering the following groups and weighting factors:
  - i. Group 1, for TC-CCPs with global revenues below [100 Mn EUR], and a weighting factor [w1=1]
  - ii. Group 2, for TC-CCPs with global revenues between [100 Mn EUR and 400 Mn EUR], and a weighting factor [w2=1.75]. This would ensure that the fees for TC-CCPs belonging to Group 2 are [75%] higher than the ones from group 1.
  - iii. Group 3, for TC-CCPs with global revenues above [400 Mn EUR], and a weighting factor of [w3=2.5]. This ensures that the fees for TC-CCPs belonging to Group 3 are [2.5] times the fees for Group 1.
24. A simulation of the impact of this approach on the Tier 1 CCPs fees structure is presented in the Table below. For the avoidance of doubt, the figures included in this table are for information only. They are based on estimates of ESMA's budget for 2024 as well as of the number of recognized Tier 1 CCPs by 31 January 2023. They are without prejudice of the actual fees that will be charged by ESMA in 2024.

**TABLE 1 - FEES SIMULATION UNDER A WEIGHTED TURNOVER FEES STRUCTURE**

Category	Weight	2024 fees simulations with weighted approach <sup>5</sup>
Group 1 (turnover < EUR 100 Mn)	1	€ 51,914.02
Group 2 (EUR 100 Mn < turnover < EUR 400 Mn)	1.75	€ 90,849.53
Group 3 (turnover > EUR 400 Mn)	2.5	€ 127,785.05

25. This weighted turnover approach would introduce a more proportionate approach with regards to the turnover of Tier 1 CCPs of different sizes. It would add limited complexity to the fees structure and would be aligned with the current fee structure for Tier 2 CCPs. Within each category, every Tier 1 CCP would pay the same amount, and the fee for each category would be a multiplier of the other categories.
26. In addition, this approach would introduce progressivity between the amount of fees and the Tier 1 CCPs' turnover, which would therefore be consistent with the requirement under Article 25d(2) of EMIR.
27. In the case of Tier 1 CCPs, and as for the current Tier 2 CCPs fees, the applicable turnover would be approximated with the annual global clearing revenues. As for Tier 2 CCPs, ESMA would collect the corresponding audited figures directly from Tier 1 CCPs on an annual basis.
28. ESMA therefore proposes that:

Article 2(2) of Delegated Regulation (EU) 2020/1302 would be amended so that the annual fee for a Tier 1 CCP is based on the total annual fee divided between all Tier 1

<sup>5</sup> This simulation is based on the 2024 budget and considers 38 recognized Tier 1 CCPs. The coefficients have been set for each group respectively to 1 / 1.75 / 2.5

CCPs and multiplied by the applicable weight determined pursuant to Article 4 of Delegated Regulation (EU) 2020/1302.

Article 4 of Delegated Regulation (EU) 2020/1302 would be amended to determine the applicable turnover for Tier 1 CCPs, which would be based on the Tier 1 CCP's worldwide revenues accrued from provision of clearing services (membership fees and clearing fees net of transaction costs), on the basis of the CCP's audited accounts from year n-2 to be provided by ESMA no later than 30 September of year n-1.

Article 4 would also determine the applicable weights based on the CCP's turnover and the relevant thresholds.

**Q1: Do you agree with the proposal to introduce different annual fees levels based on the Tier 1 CCPs global turnover?**

**Q2: Do you agree that the relevant turnover should be based on audited figures of the Tier 1 CCP's worldwide revenues from clearing services for the financial year n-2?**

**Q3: Do you agree with the proposed thresholds and weighting factors to calculate Tier 1 CCPs annual fees?**

### **3.2 Minimum and maximum annual fees per category**

29. ESMA notes that depending on the distribution of Tier 1 CCPs' turnovers, the revised framework may lead to certain small Tier 1 CCPs paying very small fee amounts, which would not cover the minimum level of common monitoring activities that ESMA needs to perform both for each individual Tier 1 CCPs and for the overall Tier 1 CCPs monitoring task.
30. A robust monitoring of Tier 1 CCPs requires a minimum number of experts with a variety of skillset for different risk elements, which needs to be present with a degree of stability in order also to be able to cope with the evolution of the scope of recognized Tier 1 CCPs.
31. To appropriately cater for the minimum level of activities common to all Tier 1 CCPs, ESMA therefore proposes to introduce a basic minimum annual fee of EUR 50 000 per Tier 1 CCPs belonging to Group 1.
32. Similarly, to ensure that the fees even for larger, more profitable Tier 1 CCPs (with reference to their worldwide turnover) remain balanced, ESMA proposes to introduce a maximum annual fee of 250 000 EUR per Tier 1 CCP belonging to Group 3. ESMA

considers that this maximum amount (which is 5 times the minimum) is appropriate considering the existing differences in turnover between the smallest and largest recognized Tier 1 CCPs, and the additional costs incurred for monitoring larger CCPs. ESMA also notes that based on available simulations this cap remains generally higher than the expected fees level for Group 3 CCPs.

33. The minimum and maximum fees referred above should be indexed each year.
34. ESMA therefore proposes that:

Article 2(2) of Delegated Regulation (EU) 2020/1302 would be amended to introduce a minimum amount of EUR 50,000 and a maximum amount of EUR 250,000 for the Tier 1 CCP annual fees. Such minimum and maximum fees should be indexed each year.

**Q4: Do you agree that the Tier 1 CCPs annual fee framework should include a maximum and a minimum amount?**

**Q5: Do you agree with the proposed amounts for the maximum and minimum annual fees for Tier 1 CCPs?**

### **3.3 Default fee for CCPs failing to submit audited figures**

35. ESMA notes that under the proposed framework, the annual fee charged from each Tier 1 CCP depends on the global turnover of all recognised Tier 1 CCPs. It is therefore essential for ESMA to have access to accurate audited figures on the CCP's turnover to be able to calculate all the annual fees for a given year. In the absence of such figures, ESMA would indeed not be able to provide an accurate calculation of the fees level.
36. Therefore, in order to provide an incentive to Tier 1 CCPs to submit audited figures in a timely manner, and to ensure that ESMA is able to compute the fees for all recognised Tier 1 CCPs, ESMA suggests that Tier 1 CCPs which would fail to submit the requested figures would be assigned the group with the maximum weighting factor, and therefore charged the highest fee.
37. Under exceptional circumstances, and only where duly justified with a legal opinion by an independent legal expert confirming the impediment under the relevant applicable laws to provide the requested figures, if a Tier 1 CCP is unable to provide audited figures for financial year n-2, ESMA may decide not to charge the highest fee. Instead ESMA would rely on the figures submitted for the past year or if the latter are not available would allocate the CCP to the group with the minimum weighing factor (Group 1).

38. ESMA therefore proposes that:

Article 2(2) is amended to specify that where audited figures have not been provided by the Tier 1 CCP, the entity would be assigned in the group with the maximum weighting factor.

**Q6: Do you agree that an incentive mechanism should be implemented to ensure that ESMA is able to compute the fees for a given year?**



## **4 Annexes**

### **4.1 Annex I - Summary of questions**

**Q1: Do you agree with the proposal to introduce different annual fees levels based on the Tier 1 CCPs global turnover?**

**Q2: Do you agree that the relevant turnover should be based on audited figures of the Tier 1 CCP's worldwide revenues from clearing services for the financial year n-2?**

**Q3: Do you agree with the proposed thresholds and weighting factors to calculate Tier 1 CCPs annual fees?**

**Q4: Do you agree that the Tier 1 CCPs annual fee framework should include a maximum and a minimum amount?**

**Q5: Do you agree with the proposed amounts for the maximum and minimum annual fees for Tier 1 CCPs?**

**Q6: Do you agree that an incentive mechanism should be implemented to ensure that ESMA is able to compute the fees for a given year?**

## 4.2 Annex II – proposed draft amendments to the Fees Delegated Regulation

Annual fees – weighted turnover approach
Article 2 of the Delegated Act (amended)
<p>1. A recognised CCP shall pay an annual fee.</p> <p>2. Where a CCP is recognised by ESMA in accordance with Article 25(2) of Regulation (EU) No 648/2012 ('Tier 1 CCP'), the annual fee for each Tier 1 CCP for a given year (n) shall be the total annual fee divided <del>in equal parts</del> between all Tier 1 CCPs recognised on 31 December of the previous year (n-1) and <b>multiplied by the applicable weight determined pursuant to Article 4a of this Regulation.</b></p> <p><b>In no case shall a Tier 1 CCP pay an annual fee of less than EUR 50,000 or of more than EUR 250,000.</b></p> <p>For the purposes of the first subparagraph, the total annual fee for a given year (n) shall be the estimate of expenditure relating to the tasks to be performed by ESMA with regard to all recognised Tier 1 CCPs under Regulation (EU) No 648/2012 as included in ESMA's budget for that year.</p> <p>3. Where a CCP is recognised by ESMA in accordance with Article 25(2b) of Regulation (EU) No 648/2012 ('Tier 2 CCP'), the annual fee for a given year (n) shall be the total annual fee divided between all Tier 2 CCPs recognised on 31 December of the previous year (n-1) and multiplied by the applicable weight determined pursuant to Article 4 of this Regulation.</p> <p>For the purposes of the first subparagraph, the total annual fee for a given year (n) shall be the estimate of expenditure relating to the tasks to be performed by ESMA with regard to all recognised Tier 2 CCPs under Regulation (EU) No 648/2012 as included in ESMA's budget for that year.</p>
Article 4a of the Delegated Act (new Article)
<p><b>Applicable turnover for Tier 1 CCPs</b></p>
<p>1. <b>The relevant turnover of a Tier 1 CCP shall be its worldwide revenues accrued from provision of clearing services (membership fees and clearing fees net of transaction costs) during financial year n-2.</b></p>

Tier 1 CCPs shall provide ESMA, on an annual basis, with audited figures confirming its worldwide revenues accrued from the provision of the clearing services referred to in the first subparagraph. The audited figures shall be submitted to ESMA no later than 30 September each year. The documents containing audited figures shall be provided in a language customary in the sphere of financial services.

If the revenues referred to in the first subparagraph are reported in another currency than euro, ESMA shall convert them into euro using the average euro foreign exchange rate applicable to the period during which the revenues were recorded. For that purpose, the euro foreign exchange reference rate published by the European Central Bank shall be used.

2. On the basis of the turnover determined in accordance with paragraph 1 for a given year (n), a Tier 1 CCP shall be deemed to belong to one of the following groups:

(a) Group 1 : annual turnover below EUR 100 million

(b) Group 2 : annual turnover above EUR 100 million and below EUR 400 million

(c) Group 3: annual turnover of EUR 400 million or above

A Tier 1 CCP in Group 1 shall be attributed the turnover weight 1.

A Tier 1 CCP in Group 2 shall be attributed the turnover weight 1,75.

A Tier 1 CCP in Group 3 shall be attributed the turnover weight 2.5.

3. Where a CCP has not provided ESMA with audited figures referred to in paragraph 1, it shall be attributed the turnover weight 2.5. Where this is justified by exceptional circumstances and the CCP has provided ESMA with a reasoned legal opinion by an independent legal expert confirming the impediment under the relevant applicable laws to provide the audited figures referred to in paragraph 1, ESMA may decide to attribute to the CCP the turnover weight applied to the CCP the previous year (n-1) or the lowest turnover weight, where no turnover weight has been applied the previous year (n-1).

4. The total turnover weight of all recognised Tier 1 CCPs for a given year (n) shall be the sum of the turnover weights determined in accordance with paragraph 2 of all Tier 1 CCPs recognised by ESMA on the 31 December of the previous year (n-1).

5. For the purpose of Article 2(2), the applicable weight of a Tier 1 CCP for a given year (n) shall be its turnover weight determined in accordance with paragraph 2 divided by the total turnover weight of all recognised Tier 1 CCPs determined in accordance with paragraph 3.

### 4.3 Annex III – initial mandate to provide a technical advice

ESMA received a provisional mandate from the European Commission on 3 May 2019 to provide technical advice for the development of the corresponding Delegated Act, which was confirmed on 30 October 2019.

#### PROVISIONAL REQUEST TO THE EUROPEAN SECURITIES AND MARKETS AUTHORITY (ESMA) FOR TECHNICAL ADVICE ON A POSSIBLE DELEGATED ACT CONCERNING THE SUPERVISORY FEES TO BE CHARGED TO THIRD-COUNTRY CENTRAL COUNTERPARTIES (CCPs)

With this provisional mandate, the Commission seeks ESMA's technical advice on a possible delegated act concerning the European Market Infrastructure Regulation (EMIR<sup>6</sup>) as amended by the 2019 CCP Supervision Regulation<sup>7</sup> (the "**Regulation as amended**"). This delegated act should be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

The provisional nature of the present mandate stems from the fact that the Regulation as amended has not yet entered into force. However, the Council (at the meeting of COREPER on 20 March 2019) and the European Parliament (in a plenary vote on 18 April 2019) have approved the political agreement on the text of the 2019 CCP Supervision Regulation. Currently, the 2019 CCP Supervision Regulation is subject to legal revision and translation prior to its publication in the EU Official Journal.

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

The mandate follows the EMIR Regulation (Article 82), the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**"),<sup>8</sup> and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").<sup>9</sup>

According to Article 25(bb) of the Regulation as amended and with regard to the supervisory fees to be charged to CCPs established in a third country, the Commission shall adopt a delegated act to specify further the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid.

\*\*\*

The European Parliament and the Council shall be duly informed about this mandate.

<sup>6</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.7.2012, p.1.

<sup>7</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0438+0+DOC+PDF+V0//EN>

<sup>8</sup> Communication of 9.12.2009. COM (2009) 673 final.

<sup>9</sup> OJ L 304, 20.11.2010, p. 47.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice within the European Securities Committee,<sup>10</sup> the Commission will continue, as appropriate, to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with experts appointed by the Member States within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The powers of the Commission to adopt delegated acts are subject to Article 82 of the EMIR Regulation. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

## **1. Context**

### **1.1 Scope**

On 13 June 2017, the Commission published its proposal to amend EMIR as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs. On 13 March 2019 the European Parliament and the Council reached a political agreement on a compromise text, which was formally endorsed by the two institutions respectively on 18 April 2019 and 20 March 2019. Publication in the Official Journal is expected by Q3 2019. The text will enter into force on the twentieth day following its publication.

The Regulation as amended will strengthen the framework for the supervision of Union and third-country CCPs that provide clearing services to EU clearing members or trading venues. This is to address the increasing concentration of risk in these infrastructures and the significant proportion of financial instruments denominated in Union currencies that are cleared outside the Union, including as a result of the expected withdrawal of the UK from the Union. The objective of the Regulation as amended is to reinforce the overall stability of the Union's financial system.

The Regulation as amended will strengthen ESMA's direct recognition and supervisory powers over third-country CCPs. Consequently, in accordance with Article 25d of the Regulation as amended, ESMA will charge fees to third-country CCPs and those fees shall cover all costs incurred by ESMA for the recognition and the performance of its tasks in relation to third-

---

<sup>10</sup> Commission's Decision of 6.6.2001 establishing the European Securities Committee, OJ L 191, 17.7.2001, p.45.

country CCPs. ESMA will charge fees based on a Regulation on fees to be adopted by the Commission in the form of a delegated act.

This provisional mandate focuses on the technical aspects of the Regulation on fees, including specifying further the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid by (i) a third-country CCP that applies for recognition; (ii) a recognised third-country CCP not classified as systemically important or likely to become systemically important for the financial stability of the Union or one of its Member States ('Tier 1 CCP'); and (iii) a recognised third-country CCP classified as systemically important or likely to become systemically important for the financial stability of the Union or one of its Member States ('Tier 2 CCP'). In providing its advice ESMA should profit from the experience of relevant national authorities in setting supervisory fees for financial institutions.

## 1.2 Principles that ESMA should take into account

On the working approach, ESMA is invited to take account of the following principles:

- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of the Regulation as amended. It should be simple and avoid suggesting excessive financial, administrative or procedural burdens for third-country CCPs.
- The technical advice should take account of the rule-of-law principle, which requires appropriate rights of defense for persons that are subject to ESMA's supervision. At the same time, it should ensure a high level of investor protection, which is a guiding principle of EU financial regulation and requires a strong supervisor with the power to carry out supervision and ensuring compliance with the EMIR Regulation in an effective and efficient way.
- While preparing its advice, ESMA should seek coherence within the regulatory framework of the Union.
- In accordance with the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**")<sup>11</sup>, ESMA should not feel confined in its reflection to elements that it considers should be addressed by the delegated acts but, if it finds it appropriate, it may indicate guidelines

---

<sup>11</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ L 331, 15.12.2010, p. 84.

and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness.

- ESMA will determine its own working methods depending on the content of the provisions being dealt with. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different standards of work being carried out by the various expert groups.
- In accordance with the ESMA Regulation, ESMA should, where relevant, involve the European Banking Authority and the European Insurance and Occupational Pensions Authority in order to ensure cross-sectoral consistency. It should also, where relevant, cooperate with the European Systemic Risk Board on any issues related to systemic risk.
- In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants in an open and transparent manner, and take into account the resulting opinions in its advice. ESMA should provide a detailed feedback statement on the consultation, specifying when consultations took place, how many responses were received and from whom, as well as the main arguments for and against the issues raised. This feedback statement should be annexed to its technical advice. The technical advice should justify ESMA's choices vis-à-vis the main arguments raised during the consultation.
- ESMA is invited to justify its advice by providing a quantitative and qualitative cost-benefit analysis of all the options considered and proposed. ESMA should provide the Commission with a description of the problem, the objectives of the technical advice, possible options for consideration and a comparison of the main arguments for and against the considered options. The cost-benefit analysis should justify ESMA's choices vis-à-vis the main considered options.
- ESMA's technical advice should not take the form of a legal text. However, ESMA should provide the Commission with a clear and structured ("articulated") text, accompanied by sufficient and detailed explanations. Furthermore, the technical advice should be presented in an easily understandable language respecting current terminology in the Union.
- ESMA should provide comprehensive technical analysis on the subject matters described in section 3 below, where these are covered by the delegated powers included in:
  - the relevant provision of the Regulation as amended;
  - the corresponding recitals, or;
  - the relevant Commission's request included in this mandate.

- ESMA should address to the Commission any question to clarify the text of the Regulation as amended that ESMA considers of relevance to the preparation of its technical advice.

## **2 Procedure**

The Commission is requesting ESMA's technical advice in view of the preparation of a delegated act to be adopted pursuant to the Regulation as amended and in particular regarding the questions referred to in section 3 of this mandate.

The mandate takes into account the EMIR Regulation (Article 82), the ESMA Regulation, the 290 Communication and the Framework Agreement.

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate will not prejudice the Commission's final decision.

In accordance with established practice, the Commission may continue to consult experts appointed by the Member States in the preparation of delegated acts relating to the Regulation as amended.

The Commission has duly informed the European Parliament and the Council about this mandate. As soon as the Commission adopts the delegated act, it will notify it simultaneously to the European Parliament and the Council.

## **3 ESMA is invited to provide technical advice on the following issues**

The Regulation as amended requires the Commission to adopt a delegated act on fees specifying further the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid by (i) a third-country CCP that applies for recognition; (ii) a recognised third-country CCP not classified as systemically important or likely to become systemically important for the financial stability of the Union or one of its Member States ('Tier 1 CCP'); and (iii) a recognised third-country CCP classified as systemically important or likely to become systemically important for the financial stability of the Union or one of its Member States ('Tier 2 CCP'). The Regulation further specifies that the fees collected from third-country CCPs shall cover all costs incurred by ESMA for the recognition and the performance of its tasks in relation to third-country CCPs. The fees charged to CCPs established in a third country shall be proportionate to the turnover of the CCPs concerned.

ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act on fees for third-country CCPs, and more specifically on the following aspects:

- ESMA is invited to reflect on the type of fees that could be levied. The Regulation provides for (i) fees associated with applications for recognition and (ii) annual fees associated with ESMA's tasks in relation to recognised third-country CCPs. Fees associated with applications



for recognition could be levied on a one-off basis, while annual fees would cover all supervisory activities for a year.

- Regarding fees associated with applications for recognition, ESMA should draw up a list of fees related to the recognition process with the corresponding amounts in order to reflect the two-tier classification system (Tier 1 and Tier 2 CCPs). ESMA is also invited to advise on whether the fees' structure should take into account the non-recognition of a third-country CCP.

- Regarding annual fees associated with ESMA's tasks in relation to recognised third-country CCPs, ESMA should indicate how the annual fees should be calculated, i.e. how its expenditure necessary for the performance of its tasks in relation to third-country CCPs should be distributed to the individual supervised CCPs, taking into account their classification as Tier 1 or Tier 2 CCPs. ESMA is invited to advise on whether fees should be yearly adjustable or fixed.

- ESMA is invited to reflect on the matters for which the fees are due. Beyond fees associated with applications for recognition, ESMA could specify what type of supervisory activities would be associated with the performance of ESMA's tasks under the Regulation as amended for Tier 1 and Tier 2 CCPs (e.g. ongoing supervisory activities, review of recognition decisions, assessment of comparable compliance, on-site inspections, stress tests).

- According to Article 25d of the Regulation as amended, the amount of fee charged to a third-country CCP shall cover all costs incurred by ESMA for recognition and the performance of its tasks in accordance with the Regulation as amended. ESMA is invited to detail its assessment of the costs it will incur for the recognition and supervision activities of third-country CCPs, and provide information on its estimates and methods of calculations. ESMA should indicate how the costs in the recognition and supervision of third-country CCPs may differ depending on their classification as Tier 1 or Tier 2 CCPs. ESMA should also advise on how the surpluses/deficits in ESMA supervision budget for third-country CCPs should be managed.

- According to Article 25d of the Regulation as amended, the amount of fee charged to a third-country CCP shall be proportionate to the turnover of the CCP concerned. ESMA is invited to provide its technical advice on appropriate method for considering the turnover of the CCP in fee calculations.

- According to Article 25d of the Regulation as amended, ESMA's costs incurred by the recognition and the performance of its tasks in relation to third-country CCPs shall be covered by fees levied from third-country CCPs. This will apply when the delegated act on fees for CCPs is adopted and enters into force, from 2021 at the latest as laid down in the legislative financial statement accompanying the 2019 CCP Supervision Regulation. Prior to this, an advance of the EU budget is required to cover ESMA's costs incurred to ensure that ESMA has the necessary resources available to perform the tasks required under the Regulation as amended in relation to third-country CCPs. The costs for third-country CCP recognition and

supervision should therefore be claimed back from third-country CCPs on the basis of the Regulation on fees. ESMA should suggest modalities for the recovery of these costs from third-country CCPs.

- ESMA should suggest the timing and appropriate modalities of the payment of the fees by (i) applicant third-country CCPs, (ii) recognised CCPs classified as Tier 1 CCPs, and (iii) recognised CCPs classified as Tier 2 CCPs. ESMA is invited to advise on appropriate schedules for collection of fees (one single payment vs several payments). It has to be ensured that ESMA always disposes of the necessary resources to finance its activities related to third-country CCPs. This could for instance be achieved by requiring the supervised third-country CCPs to pay the expected fees upfront, drawing up an account at the end of the year. ESMA may also reflect on possible penalties in case of late payment, while ensuring that such penalties are proportionate to the amount due.

#### **4. Indicative timetable**

This mandate takes into consideration that ESMA requires sufficient time to prepare its technical advice and that the Commission needs to adopt the delegated acts according to Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 82 of the EMIR Regulation that allows the European Parliament and the Council to object to a delegated act within a period of 3 months, extendible by 3 further months. The delegated act will only enter into force if neither European Parliament nor the Council has objected on expiry of that period or if both institutions have informed the Commission of their intention not to raise objections.

As laid down in the legislative financial statement accompanying the 2019 CCP Supervision Regulation, the delegated act on fees will need to enter into force by 2021 at the latest in order for ESMA to be able charge fees to third-country CCPs and for the advance to the EU budget to be repaid by 2023. Therefore it is of outmost importance to start working on this issue as soon as possible.

The deadline set to ESMA to deliver the technical advice is Q3 2019.