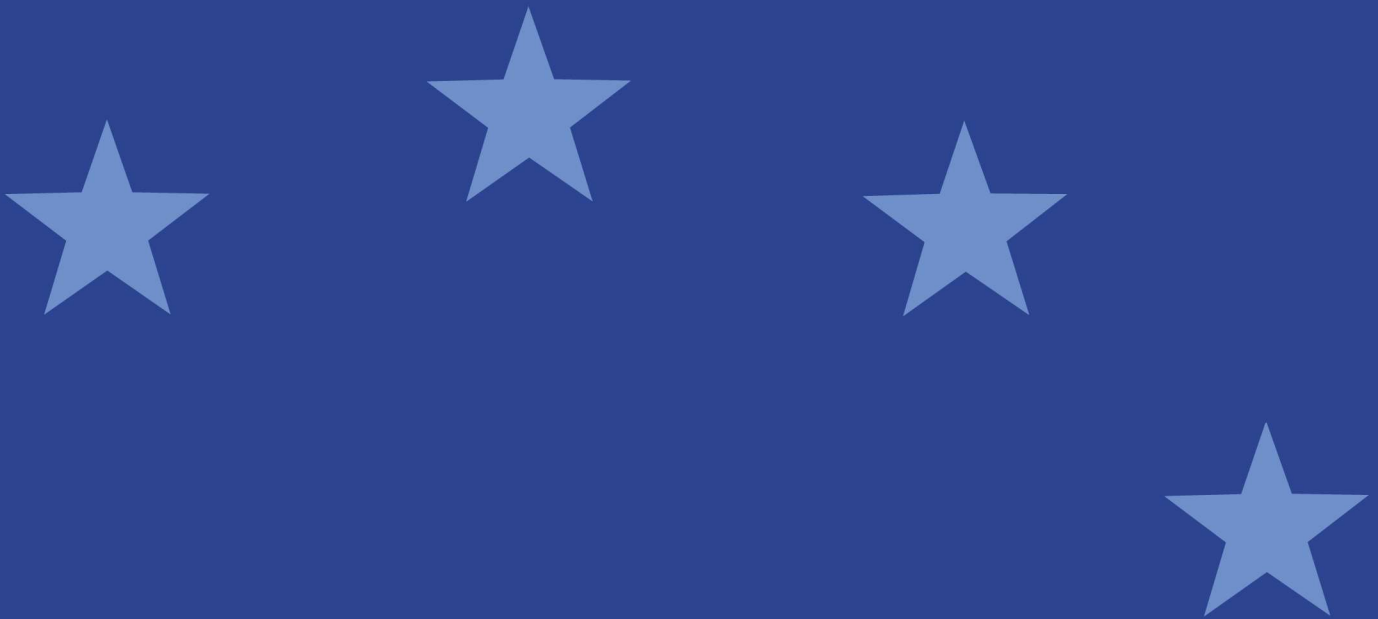




European Securities and  
Markets Authority

# Consultation Paper

**ESMA fees for Third-Country CCPs under EMIR 2.2**



## 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:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. 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](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, 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 [Legal Notice](#).

### Who should read this paper

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

## Table of Contents

Executive Summary .....	4
1 Background .....	5
2 ESMA's budgeting model and management of EC advancement.....	6
3 ESMA's expected total costs .....	8
4 ESMA's activities towards TC-CCPs .....	9
5 One-off initial recognition fees under EMIR 2.2. for TC-CCPs (i) that are not yet recognised or (ii) that change tier.....	11
6 Fees for recognised or applicant TC-CCPs in 2019.....	13
7 Fees for recognised or applicant TC-CCPs in 2020 and until end of transition period....	13
8 Comparable compliance.....	14
8.1 Option A – establishment of a single discount percentage for comparable compliance	15
8.2 Option B – establishment of two levels of discount for comparable compliance.....	16
9 First-year fee following initial recognition .....	17
10 Annual fees.....	18
10.1 Introduction .....	18
10.2 Annual fees for Tier 1 TC CCPs .....	19
10.3 Annual fees for Tier 2 TC-CCPs .....	19
11 Fees for withdrawal of TC-CCP recognition .....	22
12 Payment and reimbursement conditions under EMIR 2.2. ....	23
12.1 Fees for initial recognition.....	23
12.2 No reimbursement of fees in case of withdrawal of application by a TC-CCP before ESMA's recognition.....	24
12.3 Annual fees .....	25
12.4 Withdrawal of recognition .....	25
12.5 2019 and 2020 TC-CCP fees .....	25
13 Annexes.....	27
13.1 Annex 1 Summary of questions.....	27
13.2 Annex II.....	29

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## Executive Summary

### Reasons for publication

This consultation paper is published to seek stakeholders' input on ESMA's proposals relating to fees for third-country CCP (TC-CCPs) in relation to the competences defined under EMIR as amended by EMIR 2.2.

### Contents

The consultation paper is comprised of twelve sections and two annexes. Section 1 includes the background of this consultation paper and the agreed text of EMIR 2.2. Section 2 summarises ESMA's applicable budgeting approach. Section 3 and 4 provide information on the main activities that ESMA will need to carry out and the relevant high-level costs for the supervision of TC-CCPs. Section 5 specifies the types of one-off fee for initial recognition of TC-CCPs. Sections 6 and 7 specify the approach for 2019 and 2020 fees, respectively. Section 8 details how comparable compliance will be reflected in the fees. Section 9 outlines the approach for the first-year fee. Section 10 sets out the framework for the calculation of annual fees and their dependence on other fees charged by ESMA in the context of EMIR 2.2. Section 11 specifies the applicable fee in the case of full withdrawal of recognition of a TC-CCP. Section 12 provides the conditions for payment and reimbursement of fees. Annex I comprises all the consultation questions, whereas, Annex II contains the provisional mandate received from the European Commission.

### Next Steps

ESMA will consider the feedback it receives to this consultation and expects to publish a final report and submission of the advice to the European Commission soon after.

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# 1 Background

1. On 13 June 2017, the European Commission (EC) published a proposal for the amendment of EMIR and the ESMA Regulation (EMIR 2.2 proposal). The objective of the proposal was that “the EU equips its Capital Markets Union with a more effective and consistent supervisory system for CCPs, in the interest of further market integration, financial stability and a level playing field.”
2. On 13 March 2019, the European Parliament, the Council and the Commission reached a political agreement on the review of the regulatory framework for the authorisation and supervision of CCPs established in Title III of Regulation 648/2012 (EMIR2.2, hereinafter). While the legislative process for the adoption of the proposed regulation amending EMIR in this respect is being finalised, ESMA has initiated its preparatory work for the implementation of the new regime for third-country CCPs (TC-CCPs).
3. Given the growing importance of CCPs in the financial system and the global increase in clearing and concentration of risks in a limited number of global CCPs, the framework for recognition and supervision of TC-CCPs has been enhanced with the introduction of EMIR2.2. In particular, a two-tier system for TC-CCPs based on their systemic importance has been introduced. Where a TC-CCP is determined systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States, such TC-CCP will be considered a Tier 2 third-country CCP (Tier 2 TC-CCP) by ESMA in accordance with Article 25(2a) of EMIR2.2. A TC-CCP that has not been determined as systemically important or likely to become systematically important for the Union or for one or more of the Member States is referred to in this document as a Tier 1 third-country CCP (Tier 1 TC-CCP).
4. In particular, the amendments establish within the EU exclusive supervisory competences for ESMA for TC-CCPs. In accordance with recital (44) of EMIR 2.2, in order to enable ESMA to conduct its tasks with regards to TC-CCPs effectively, TC-CCPs should pay fees for ESMA's supervisory and administrative tasks. In this regard, paragraphs 1 and 2 of Article 25bb provides that

*“1. ESMA shall charge the following fees to CCPs established in a third country 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 to the performance of its tasks in accordance with this Regulation.”*

5. Furthermore, paragraph 3 of Article 25bb provides that:

6. “3. The Commission shall adopt a delegated act in accordance with Article 82 in order to further specify the following:
  7. (a) the types of fees;
  8. (b) the matters for which fees are due;
  9. (c) the amount of the fees;
  10. (d) the manner in which fees are to be paid by the following entities:
    - (i) a CCP established in a third country which applies for recognition;
    - (ii) a recognised CCP classified as a Tier 1 CCP in accordance with Article 25(2);
    - (iii) a recognised CCP classified as a Tier 2 CCP in accordance with Article 25(2b).”

11. Accordingly, on 6 May 2019, ESMA received a request from the EC to provide technical advice to assist the latter on the possible content of this delegated act. The request is enclosed in Annex II in this paper.

12. In light of the adopted framework for the supervision of TC-CCPs and to provide advice to the EC with regards to the fees related to the ESMA’s work for the recognition and supervision of TC-CCPs, ESMA is specifying in this consultation and requesting feedback on the fees applicable to TC-CCPs.

13. It is worth noting that ESMA has been in charge of the recognition of TC-CCPs since the entry into force of EMIR. However, tasks related to TC-CCPs were supported by the regular ESMA budget and not by specific fees charged to the TC-CCPs.

## **2 ESMA’s budgeting model and management of EC advancement**

14. In order to enable ESMA to conduct its tasks related to TC-CCPs effectively as well as to ensure an efficient use of ESMA’s budget, it is necessary that TC-CCPs, private sector entities with a profitmaking objective, cover all costs of doing business, including the costs related to ESMA’s recognition and supervision of TC-CCPs.

15. ESMA applies a universal budgeting approach, which means that income from fees is treated as general revenue. This is in line with the standard practice of other partially funded EU agencies, as recommended by DG Budget of the EC.
16. ESMA prepares its annual budget aiming at balancing income through fees with the incurred expenditure, understanding that deficits or surpluses are to be balanced by the rest of ESMA's income sources. The total amount of ESMA's annual revenues is defined on the basis of ESMA's Activity-Based Management methodology.
17. In case of deficits (ESMA collecting less than incurred), ESMA does not recover the deficit from the supervised entities. If the deficit is repeated or significant, ESMA should analyse the reasons why it happened, drawing up lessons for the next budgeting period. For surpluses (ESMA collecting more than incurred) the same reasoning should be followed. Hence, no excess of fees is paid back to the supervised entities. This mechanism is already in place at ESMA for credit rating agencies (CRAs) and also for trade repositories (TRs) under EMIR<sup>1</sup> (ESMA fee regulations).
18. Through the existing mechanisms in place (EU budgetary procedure, annual reporting, single programming document), the ESMA Management Board and Board of Supervisors, of which the EC is a permanent Member, remain fully in control of the fees' collection and expenditure levels.
19. On a yearly basis, the correct implementation of ESMA's budget, in particular of the fee-funded budget, versus the EU Financial Regulation is checked by the European Court of Auditors. The final audit report is communicated to the European Parliament and Council.
20. The total amount of the estimated costs is presented together with the annual work plan in September of the year N-1, and the approved budget is published on ESMA's website in January of the year N.
21. In addition, ESMA has been requested by the Internal Audit Service of the EC to further simplify and harmonise, to the extent feasible, its fee models. Therefore, in this consultation, ESMA is consulting on fee proposals that are in line with this general objective.
22. Furthermore, ESMA aims also at collecting fees by the start of a calendar year so as to ensure the availability of resources for its activities. The determination of fees needs to be based on the latest available information. More detailed information on the payment and reimbursement conditions is specified in section 12.
23. Finally, to facilitate the set-up of ESMA's new tasks with regards to TC-CCPs, the EC has foreseen an advancement of ESMA's fee revenues for 2019 (€1,045,000) and 2020 (€5,346,000) representing maximum amounts available in order to cover ESMA's overall cost for TC-CCP for these two years (including preparatory work). As a result, any amount

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<sup>1</sup> In the case of TRs it is also proposed to follow the same model under SFTR and under Securitisation Regulation.

advanced by the EC to cover ESMA's yearly costs in relation to TC-CCPs and that is not covered by corresponding fees for that period will need to be recovered in the years 2022 and 2023. These costs will be distributed across the years in which they need to be returned to the EC. This is a one-off situation and constitutes a deviation from the general framework under which ESMA's fees, revenues, and costs operate.

ESMA establishes a harmonised framework for dealing with surpluses and deficits and for treating the annual fees under both EMIR 2.2 as general revenue as follows:

- a. In case of deficits (ESMA collects less than incurred), ESMA does not recover the deficit from TC-CCPs.
- b. In case of surpluses (ESMA collects more than incurred), ESMA does not pay back the surplus to TC-CCPs.
- c. Fees are to be paid by the end of the previous calendar year to the one for which fees are due to ensure availability of resources for the performance of ESMA's tasks.

By way of derogation to the previous paragraph, in relation to the period 2019-2020 for which an advancement from the European Commission will be given to ESMA, ESMA will balance any surplus or deficit in TC-CCP budget with the 2021-2023 TC-CCP budgets. ESMA will allocate the relevant costs proportionately to Tier 1 and Tier 2 TC-CCPs.

### 3 ESMA's expected total costs

24. In the revised Legislative Financial Statement accompanying EMIR 2.2, the EC has included an extensive assessment of the objectives, tasks and resources needed by ESMA under EMIR 2.2. Based on this assessment, the fees to be paid by TC-CCP should cover the costs of up to 49 full-time equivalent staff members (FTEs), carrying out the tasks under the Regulation, including the necessary horizontal functions, and the three independent members of the Supervisory Committee in the steady state of implementation of EMIR 2.2. Under this assumption, the TC-CCP maximum budget in the steady state is around 8-9 million EUR, including, among others, initial recognition, application of comparable compliance and supervision of TC-CCPs. This figure is in line with the 2019 ESMA supervisory budget for CRAs. However, as explained in section 2, ESMA assesses on an annual basis its budget, which comprises not only the number of staff needed to perform a given task but also the related logistics, IT, communications and general costs. This structure is developed consistently with the ESMA fee regulations for TRs<sup>2</sup> and CRAs<sup>3</sup>.

<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:279:0004:0009:EN:PDF>

<sup>3</sup> <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:090:0006:0010:EN:PDF>



## 4 ESMA's activities towards TC-CCPs

25. In terms of supervisory and administrative activities that ESMA will need to perform vis-à-vis TC-CCPs, the following ones are included in EMIR as amended by EMIR 2.2:

- a. Recognition of TC-CCP under EMIR 2.2, including tiering<sup>4</sup>, in accordance with paragraphs (2a), (2b) and (2c) of Article 25;
- b. Review of recognition decisions adopted prior to EMIR 2.2's entry into force, including tiering, in accordance with Article 89(3c);
- c. Annual on-going and regular assessment of compliance with EMIR by TC-CCPs, including the conditions for recognition for Tier 2 TC-CCPs in accordance with Article 25b;
- d. Review of recognition for Tier 1 and Tier 2 TC-CCPs (i) where a TC-CCP intends to extend or reduce the range of its activities and services in the Union; and (ii) in any case at least every five years, in accordance with Article 25(5);
- e. Ongoing supervision of recognised Tier 2 TC-CCPs, including on-site inspections to Tier 2 TC-CCPs;
- f. Conclusion and maintenance of cooperation arrangements with third-country authorities in accordance with Article 25(7) and monitoring of the regulatory and supervisory developments in third countries in accordance with Article 25(6b);
- g. Assessing partial or full withdrawal of recognition of recognised Tier 1 and Tier 2 TC-CCPs.

26. Some of the ESMA activities will be one-off activities and will take place in the early years of the entry into force of EMIR 2.2. The tiering for TC-CCPs already recognised under the current EMIR should be completed within 18 months after the entry into force of the delegated act on tiering according to Article 89(3c). The rest will be completed on an ongoing basis in accordance with a frequency indicated in EMIR 2.2.

27. Once the delegated acts under Article 25(2a) and Article 25a(3) of EMIR become applicable, ESMA will be empowered to perform a tiering of the TC-CCPs, in order for them to be classified as Tier 1 TC-CCPs or Tier 2 TC-CCPs. To carry out the tiering of TC-CCPs, ESMA will need to collect, process and assess an important amount of information needed to classify the entities as either Tier 1 or Tier 2 in the recognition process laid down in EMIR 2.2. These costs will be covered by either a one-off initial recognition fee for new applicants, the relevant 2019 and 2020 fees, the fees payable by TC-CCPs that restate their currently

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<sup>4</sup> Tiering is the process to assess whether a CCP is Tier 1 or Tier 2 in accordance with the criteria established in the EC delegated act adopted under Article 25(2a) of EMIR 2.2. For more information please refer to ESMA70-151-2138 document

suspended applications or entities that become Tier 2 TC-CCPs, or by the annual fees applicable both to Tier 1 and Tier 2 TC-CCP.

28. The detail and amount of information to be handled for recognition and on-going tasks with respect to TC-CCPs will be different, thus different levels of fees linked to the respective activities are established.
29. Although Tier 1 TC-CCPs may not be considered as systemically important, under EMIR 2.2 at the time of tiering, ESMA is required to review regularly their systemic importance. Therefore, even if an entity would not qualify as Tier 2 TC-CCP, there will be costs attached to the tasks to be performed under EMIR 2.2 and the periodic assessment of systemic relevance.
30. To sum up, activities with regards to the TC-CCPs include, among others, the following tasks:
  - a. ongoing supervision of Tier 2 TC-CCPs, consisting of but not limited to: monitoring of the ongoing compliance with EMIR requirements, through requests for information, investigations and on-site inspection, day-to-day contact (physical meetings, conference calls, etc) with CCP management, compliance, legal, IT, risk management, financial, business and operations teams; assessment of risk models, CCP rulebook and procedures, board and executive staff appointments, outsourced services, extension of activities and services, IT solutions, capital adequacy, CCP's shareholders / shareholding structure, and interoperability arrangements; review of internal audits; comprehensive risk assessment; issuance of recommendations and crisis management; risk analysis and modelling; legal analysis and support; bilateral and multilateral meetings with stakeholders, in particular TC-CCPs and trading venues as well as with other regulators or supervisors, therefore requiring frequent travels;
  - b. assessment of comparable compliance of Tier 2 TC-CCPs;
  - c. performance of stress tests for Tier 2 TC-CCPs;
  - d. establishment and management of a TC-CCP college;
  - e. adequate information exchange between the ESMA Supervisory Committee and the TC-CCP College;
  - f. effective cooperation with central banks of issue and the ESRB on relevant matters:  
and
  - g. performance of impact assessment underlying a potential recommendation to deny recognition to a third-country CCP.

31. Further to these activities, ESMA will also need to update the MoU with the relevant third-country competent authority(ies) and monitor the regulatory and supervisory developments in third countries for which equivalence decisions have been adopted by the EC.
32. Last but not least, when ESMA carries out its tasks, support staff in the horizontal departments of ESMA, such as legal, resources management and cooperation is needed. While these areas are not directly involved in the supervision, they perform essential activities for the efficient and effective functioning of the organisation, an increase in their number is needed to better undertake the required new tasks. These resources are therefore taken into account when defining the annual budget.
33. The proposed amounts of fees in the subsequent sections therefore cover the cost estimates related to (i) average FTE cost including support staff (e.g. staff in support areas such as legal, resources, corporate affairs, data and risk), (ii) allocation of the appropriate costs of the independent members of the Supervisory Committee, as well as (iii) impact of the associated costs for these staff relating to the extra office space, IT systems/applications, missions, training and others.
34. As an example, a fee of 350,000 EUR fee would comprise the overall cost of 2 FTE and the associated costs mentioned above. 2 FTE is equal to either two staff members working for one year or six staff members working for four months.

## **5 One-off initial recognition fees under EMIR 2.2. for TC-CCPs (i) that are not yet recognised or (ii) that change tier**

35. As mentioned above, the initial recognition of TC-CCPs under EMIR 2.2. implies that certain activities are performed by ESMA. The MoUs with the relevant TC authorities may need to be updated and ESMA will need to collect, process and assess data from the TC-CCPs regarding their organisation, services and activities in order to perform the tiering of the TC-CCP, i.e. such TC-CCP is considered either as Tier 1 TC-CCP or as Tier 2 TC-CCP depending on if such TC-CCP is, or likely to become, systemically important.
36. The indicators to be used by ESMA in determining whether a TC-CCP is or is likely to be systemically important will be included in the delegated act adopted by EC under the last paragraph of Article 25(2a) of EMIR as amended by EMIR 2.2.
37. ESMA shall, after conducting the assessment referred to in the first subparagraph of Article 25(2a) of EMIR as amended by EMIR 2.2, inform the applicant CCP whether it is considered a Tier 1 CCP or not within 30 working days of the determination that that CCP's application is complete, hence ESMA would proceed with the recognition of the CCPs, only when it has at its disposal complete information in view of the type of TC-CCP and has completed the process for tiering.

38. Subsequently, once a TC-CCP is determined not to be a Tier 1 TC-CCP, additional information to assess its compliance with the corresponding conditions for recognition for that entity will need to be collected.
39. A Tier 2 TC-CCP may request the application of comparable compliance. This would require the existence of an EC delegated act declaring comparable compliance, which is further detailed in Section 8.
40. Following the performance of the periodic tiering review of the TC-CCPs, it may be that a Tier 1 TC-CCP becomes a Tier 2 TC-CCP. In that case, the new Tier 2 TC-CCP would need to follow the process to be recognised as a Tier 2 TC-CCP. This would also mean an increased supervisory and administrative effort towards that entity. To cater for these extra costs, the entity that becomes a Tier 2 TC-CCP will have to pay the difference between the Tier 2 TC-CCP fee and the Tier 1 TC-CCP fee.
41. In the case, when a Tier 2 TC-CCP becomes Tier 1 TC-CCP, ESMA will not be reimbursing or giving back the one-off initial fee difference to that entity, as there has already been an increased supervisory and administrative effort towards that entity when it was determined to be Tier 2 TC-CCP. Instead, the Tier 1 TC-CCP fee will be applicable to that entity for the following year.
42. Based on the FTEs expected to be dedicated to assessing an application for recognition and without taking comparable compliance into account, the following fees are proposed:
  - a. In the case of a Tier 2 TC-CCP, one-off fee of 350,000 EUR covering the costs of tiering and additional information to be assessed prior to the initial recognition is granted.
  - b. In the case of Tier 1 TC-CCPs, one-off fee of 50,000 EUR covering the reduced costs of assessing an application for recognition of Tier 1 TC-CCP.
43. In the case of TC-CCPs whose application is suspended, they will not be subject to fees during the suspension. Once their application is not considered as suspended they will become subject to the fees detailed in this section. The reason for this is that these entities would need to cover the costs for their assessment under EMIR 2.2.

ESMA proposes the following one-off fees for initial recognition under EMIR 2.2. or for change of tier following review:

- A. One-off fee of 350,000 EUR for Tier 2 TC-CCPs related to initial tiering and recognition of TC-CCPs, including cost of MoUs update and equivalence assessment, as applicable;
- B. One-off fee of 50,000 EUR for Tier 1 TC-CCPs fees related to initial tiering and recognition of TC-CCPs, including cost of MoUs update and equivalence assessment, if needed.

When a Tier 1 TC-CCP becomes Tier 2 TC-CCP, it should pay the difference between the two fees, as indicated in section 12.

ESMA proposes that each TC-CCPs whose application for recognition is suspended does not pay any fee during the suspension of the application.

- Q1. Do you agree with the proposed one-off fees for initial recognition for Tier 2 TC-CCPs? Please elaborate on the reasons for your answer.**
- Q2. Do you agree with the proposed one-off fees for initial recognition for Tier 1 TC-CCPs? Please elaborate on the reasons for your answer.**
- Q3. Do you agree with the payment by a Tier 1 TC-CCP that becomes Tier 2 TC-CCP of the difference between the two fees? Please elaborate on the reasons for your answer.**

## **6 Fees for recognised or applicant TC-CCPs in 2019**

44. It is expected that EMIR 2.2. will enter into force in Q4 2019. To cover the costs related to TC-CCPs, ESMA will charge in 2019 all TC-CCPs that are already recognised with a fee that will be proportionate to the Tier 1 TC-CCP annual fee weighted by the proportion of days in 2019 for which EMIR 2.2. is in force.

ESMA proposes that each TC-CCP that is recognised at the time of entry into force of EMIR 2.2. pays the Tier 1 TC-CCP annual fee factored by the proportion of days for which EMIR 2.2. is in force in 2019.

- Q4. Do you agree with the approach for determining the fees in 2019 for recognised or applicant TC-CCPs? Please elaborate on the reasons for your response.**

## **7 Fees for recognised or applicant TC-CCPs in 2020 and until end of transition period**

45. Operationally-wise, tiering can only be performed following the entry into force of the delegated acts on tiering and on comparable compliance adopted by EC under the last paragraphs of Article 25(2a) and of Article 25a of EMIR as amended by EMIR 2.2. This is expected to take place in early 2020. In case the entry into force is delayed, ESMA propose to keep the same approach as for 2019.
46. Therefore, it is proposed that for 2020 all TC-CCPs pay the annual fee applicable for Tier 1 TC-CCPs. This fee will include also the costs of performing the tiering. Once tiering is conducted it might result in a TC-CCP becoming Tier 2 TC-CCP.
47. The entities that are determined to be Tier 2 would need to be recognised as Tier 2 TC-CCPs following the steps indicated in paragraphs 37 to 40 in the section for initial

recognition. The Tier 2 TC-CCP should then pay the difference between the Tier 1 TC-CCP one-off fee and the Tier 2 TC-CCP one-off fee, i.e. 300,000 EUR. In this way it will be ensured that there is a level playing field between new applicants that are determined Tier 2 and the already recognised TC-CCPs that following the performance of the tiering process are determined to be Tier 2 TC-CCPs.

48. In case the tiering is performed before the entry into force of the delegated act on fees, i.e. the delegated act on tiering has entered into force before the delegated act on fees, the Tier 2 TC-CCP will need to pay only once the initial fee applicable to Tier 2 TC-CCPs and not in two instalments.

ESMA proposes that each TC-CCP that is recognised at the time of entry into force of EMIR 2.2. and where the review under Article 89(3c) has not yet been finalised, pays as annual fee 50,000 EUR.

ESMA proposes that in case an already recognised TC-CCP is determined, following the performance of the tiering process, to be a Tier 2 TC-CCP, that TC-CCP should pay in addition 300,000 EUR.

ESMA proposes that in case an already recognised TC-CCP is determined, following the performance of the tiering process, not to be a Tier 2 TC-CCP, that TC-CCP should not pay any additional fee to the 50,000 EUR that it has already paid.

Notwithstanding the above, in case the tiering of TC-CCPs is performed before the entry into force of the delegated act on fees, then the TC-CCPs should pay the respective Tier 1 or Tier 2 TC CCP fees, as determined, following the performance of the tiering.

- Q5. Do you agree with the approach for determining the fees in 2020 and until end of transition period for recognised or applicant TC-CCPs? Please elaborate on the reasons for your response.**

## 8 Comparable compliance

49. Article 25a of EMIR as amended by EMIR 2.2 envisages the possibility for a Tier 2 TC-CCP to request that ESMA assesses its comparable compliance with the requirements under EMIR, i.e. the extent to which the CCP's compliance with Article 16, Title IV and Title V of EMIR is satisfied by the CCP's compliance with the comparable requirements applicable in the third country. The new Article 25a(3) of EMIR mandates the EC to adopt a delegated act to specify: (a) the minimum elements to be assessed for the purposes of "comparable compliance"; and (b) the modalities and conditions to carry out the assessment for those purposes. In accordance with Article 82(3) of EMIR, the EC shall endeavour to consult ESMA before adopting such a delegated act.

50. Therefore, where a Tier 2 CCP submits a reasoned request that ESMA assesses comparable compliance with the relevant rules that apply to that TC-CCP, ESMA will need

to carry out a detailed assessment of the provisions for which comparable compliance is applicable. This detailed assessment will result in increased initial costs, which is the result of the additional activities to be performed vis-à-vis the Tier 2 TC-CCP. However, following the completion of the assessment, the resulting on-going supervisory and administrative effort towards that Tier 2 TC-CCP will be reduced, as it is expected that there will be a greater level of reliance on the compliance with EMIR through the compliance with comparable rules applying to that TC-CCP. This will reduce the annual fees charged to the relevant Tier 2 TC-CCPs.

51. ESMA does not expect that all entities would have the same level of comparable compliance. However, ESMA is also mindful that high granularity of the fees and respective discounts relating to the application of comparable compliance would increase the financial management costs unnecessarily, with limited tangible benefit for the entities and ESMA.
52. Nevertheless, two options are being considered with regards to the application of comparable compliance.
53. Option A establishes a single additional fee of 250,000 EUR for the assessment of the applicability of comparable compliance and a 20% discount from the annual fees for the entities for which comparable compliance is applicable.
54. Option B establishes a single additional fee of 250,000 EUR for the assessment of the applicability of comparable compliance and two levels of discount (15% and 35% respectively), depending on whether the Tier 2 TC-CCP has a low or high degree of comparable compliance.
55. The two options are analysed in sections 8.1 and 8.2.
56. Therefore, given the ESMA budget procedure, this will result in (i) balancing with the other Tier 2 TC-CCPs which do not have comparable compliance and (ii) lowering the total number of FTEs needed, thus lowering the total cost of TC-CCP activities.
57. For the avoidance of doubt, if the application of comparable compliance for a given Tier 2 TC-CCP is removed, then the discount will not be applicable. The payment and reimbursement of the one-off fee are detailed in sections 12.1 and 12.2.

## **8.1 Option A – establishment of a single discount percentage for comparable compliance**

58. Option A establishes the following framework for the fees and discounts related to comparable compliance:
  - a. one-off fee of 250,000 EUR for each entity requesting comparable compliance in addition to the recognition fee;

- b. 20% discount for the annual fee, compared with the amount due by entities without comparable compliance.

59. The benefits of this approach are that it (i) simplifies the determination of comparable compliance from a fee management perspective, (ii) eliminates any potential conflicts of interest with regards to the determination of high or low level of comparable compliance by the applicant Tier 2 TC-CCP or by ESMA and (iii) ensures increased upfront predictability of fees for applicant Tier 2 TC-CCPs.

60. Therefore, given the ESMA budget procedure, this will result in (i) balancing with the other Tier 2 TC-CCPs which do not have comparable compliance and (ii) lowering the total number of FTEs needed (in terms of administration of the fee regime), thus lowering the total cost of TC-CCP supervision.

61. The drawback of this approach is that it applies the same discount to entities which might have very different levels of comparable compliance.

#### Option A

ESMA proposes that the following framework for comparable compliance fees under EMIR 2.2.:

A. One-off fee of 250,000 EUR for each entity requesting comparable compliance in addition to the one-off initial recognition fee;

B. 20% discount for the annual fee, compared with the amount due by entities without comparable compliance.

If the application of comparable compliance for a given Tier 2 TC-CCP is removed, then the discount will not be applicable.

## 8.2 Option B – establishment of two levels of discount for comparable compliance

62. Option B establishes the following framework for the fees and discounts related to comparable compliance:

- a. one-off fee of 250,000 EUR for each entity requesting comparable compliance in addition to the recognition fee;
- b. two levels of discount compared with the amount due by entities without comparable compliance
  - i. 15% discount for the annual fee for entities with low comparable compliance;



- ii. 35% discount for the annual fee for entities with low comparable compliance;
63. The reason for having a single one-off fee for requesting comparable compliance is that at the time of the request most likely it will not be known if the resulting comparable compliance will be high or low.
64. The benefits of this approach compared with Option A are that it (i) more accurately represents the different level of applicability of comparable compliance and thus related costs.
65. The drawbacks of this approach compared with Option A are that it (i) makes more complex the determination of comparable compliance from a fee management perspective, (ii) creates some conflicts of interest for the applicant Tier 2 TC-CCP or ESMA with regards to the determination of low or high comparable compliance and (iii) reduces upfront predictability of fees for applicant Tier 2 TC-CCPs.

#### Option B

ESMA proposes that the following framework for comparable compliance fees under EMIR 2.2.:

A. One-off fee of 250,000 EUR for each entity requesting comparable compliance in addition to the one-off initial recognition fee;

B. Two levels of discount compared with the amount due by entities without comparable compliance

- i. 15% discount for the annual fee for entities with low comparable compliance;

- ii. 35% discount for the annual fee for entities with high comparable compliance.

If the application of comparable compliance for a given Tier 2 TC-CCP is removed, then the discount will not be applicable.

**Q6. Do you prefer Option A or Option B as an approach towards establishment of fees and discounts for comparable compliance? Please elaborate on the reasons for your response.**

## 9 First-year fee following initial recognition

66. It is very unusual that a recognition decision would take place on the last day of a calendar year and it will enter into force on the first day of the subsequent calendar year. Normally, administrative decisions take place during the calendar year. This requires that the costs until the end of a given year are covered by fees which are not the recognition fees.

67. Under EMIR and SFTR, ESMA indicated that the supervisory activities in the first year after registration are linked to the registration process and included a formula for calculating the first-year fee as a percentage of the registration fee which is similar to the initial recognition fee in this CP.
68. The percentage should be related to the period of time during which the TC-CCP is supervised in its first year of operations under the EMIR 2.2. framework. This period of time should, of course, be linked to the period of time required to recognise a TC-CCP. EMIR establishes 30 working days for assessment of completeness and 180 working days for granting recognition.
69. ESMA understands that this is the most proportionate approach and the one ensuring greater alignment with other types of fees already charged by ESMA.

$$TC-CCP \text{ first-year fee} = \text{Min} (\text{Recognition fee}, \text{Recognition fee} * \text{Coefficient})$$

$$\text{Coefficient} = \frac{\text{Supervisory working days TC-CCP}_i}{210 \text{ working days}}$$

ESMA proposes the following first-year fees:

$$TC-CCP \text{ first-year fee} = \text{Min} (\text{Recognition fee}, \text{Recognition fee} * \text{Coefficient})$$

$$\text{Coefficient} = \frac{\text{Supervisory working days TC-CCP}_i}{210 \text{ working days}}$$

- Q7. Do you agree with the proposed approach to calculate first-year fees for TC-CCPs under EMIR 2.2? Please elaborate on the reasons for your answer.**

## 10 Annual fees

### 10.1 Introduction

70. As indicated in section 2, ESMA's budget is defined prior to the beginning of a given calendar year, and all fee revenues are considered as general revenue.
71. ESMA is assigned with several recurrent tasks under EMIR 2.2. Establishing a separate fee for each activity will overcomplicate the fee schedule, thus run contrary to the principles included in section 2. In addition, it could create a misperception of potential conflict of interest to perform those activities that require higher fees. Therefore, consistently with other annual fees already charged by ESMA, such as those to TRs and CRAs, ESMA is proposing to establish fees that are not linked to specific tasks, but rather cover all activities related to TC-CCPs.
72. Tasks related to Tier 1 TC-CCPs will be established in a way to perform the relevant assessment of compliance, and it will cover all the fixed costs – periodic review, requests

for information, on-going monitoring and, investigations. The activities vis-à-vis Tier 2 TC-CCPs will cover much more tasks, including all those relevant for Tier 1 TC-CCPs. In that regard, the annual fee for Tier 1 TC-CCPs could be seen as a sort of a minimum fee already in place for TRs and CRAs under the ESMA fee regulations.

73. ESMA understands that the predictability of the annual fees for TC-CCP to is relatively high, having regard to (i) the fact that the universe of entities that might be subject to EMIR 2.2. is known and to the (ii) budgeting approach indicated in section 2.

**Q8. Do you agree with the proposed approach for the calculation of annual fees? Please elaborate on the reasons for your response.**

## **10.2 Annual fees for Tier 1 TC CCPs**

74. The fees for Tier 1 TC-CCPs cover the activities vis-à-vis Tier 1 TC-CCPs that will be performed by ESMA.

75. These include, as mentioned earlier, all the fixed costs – tiering review, requests for information, on-going monitoring and investigations.

76. Therefore, the fees for Tier 1 TC-CCPs could be considered as a minimum fee which is already in place for other supervised entities such as TRs and CRAs. Having regard to ESMA's estimates and given the tasks required under EMIR 2.2. ESMA proposes to establish this fee at the level of 50,000 EUR.

ESMA proposes that each Tier 1 TC-CCPs pays an annual fee of 50,000 EUR.

**Q9. Do you agree with the proposed amount of annual fees for Tier 1 TC-CCPs recognised under EMIR 2.2? Please elaborate on the reasons for your answer.**

## **10.3 Annual fees for Tier 2 TC-CCPs**

77. The annual fee definition process will follow the same steps as the budget for any other revenue from supervised entities received by ESMA:

- a. Determination of budget, i.e. the number of FTEs working directly or indirectly on TC-CCPs.
- b. Attribution of the relevant fixed and minimum fee amounts to the relevant supervised entities
- c. Allocation of the resulting portion of fees to the relevant group of supervised entities

78. Differently from other industries supervised by ESMA, CCPs have already an extensive track record and the business models, while evolving, are based on similar pillars. The

potential disruption of new suppliers of clearing services is neither considered an issue, as any potentially successful commercial offering will be assessed in the tiering processes required under EMIR 2.2.

79. To properly account for the supervisory and administrative effort, ESMA would need to link the fees to the indicators for the determination of systemic importance. However, this would render the calculation of the fees and their predictability very complex.
80. In another context, ESMA used activity-based data, i.e. data on a number of transactions and has experienced certain hurdles in reconciling activity information from several sources, hence prefers not to use activity data for calculation of Tier 2 TC-CCP fees. It is worth mentioning that most of the activity aspects will be assessed when performing the tiering of the TC-CCPs, hence using them all again could be considered duplication and might not render the desired results. Therefore, ESMA will not use directly activity data for the determination of annual fees.
81. Currently, under the CRA regulation on fees and the SFTR regulation on fees, ESMA has included as a proxy for applicable turnover the revenues earned by the supervised entity from core business services and from those ancillary services linked to the core one. To increase the reliability of the information provided, ESMA requires annual audited accounts of the entity. ESMA is certain that the TC-CCPs will not prepare their financial accounts in EUR, therefore conversion of the relevant figures would be needed. In that case, the average exchange rate for the period during which the revenues would be generated should be used.
82. Furthermore, ESMA is also aware that the business year for the TC-CCPs is different. In some case it is April-March, in some others it is July-June. This might introduce a further degree of non-comparability between CCPs.
83. When establishing the applicable revenues for the purposes of calculation of turnover, ESMA would need also to consider whether to take (i) all the revenues generated by the CCP, (ii) only the ones generated by EU27 clearing members, or (iii) the ones relating to EU 27 products or (iv) a mix of the latter. In either case, ESMA could also consider whether taking (a) only the revenues from clearing fees, or (b) also the ones from treasury activities and membership.
84. Based on the aforementioned aspects, extensive work would be required to calculate the applicable fees under such a framework, ESMA believes that an equal flat annual fee for the Tier 2 TC-CCPs would be more appropriate.
85. A different approach with a flat fee would mean that all Tier 2 TC-CCPs are charged an identical fee which is the result of allocation of an equal share of the Tier 2 TC-CCPs budget to each entity.

86. This approach would remove the need to collect, adjust and supervise the quality of financial information from the Tier 2 TC-CCPs and to convert it into EUR and will mitigate any seasonality due to different financial year across the TC-CCPs.
87. In addition, this approach will make an efficient use of the tiering process under which activity information is already collected, thus will reduce data collection requirements for Tier 2 TC-CCPs.
88. Moreover, by having separate annual fees for Tier 1 and Tier 2 TC-CCPs, ESMA not only duly takes into account the legal requirements established by the co-legislators to relate fees proportionately to the turnover of the TC-CCPs, but also makes a fairer representation of ESMA's costs vis-à-vis the Tier 2 TC-CCPs.
89. The only drawback of having a flat annual fee for Tier 2 TC-CCPs is that it will take turnover only indirectly into account, i.e. in the context of all the data provided as part of the tiering process.
90. The advantages and disadvantages of using a flat fee are included below:

#### Flat annual fee for Tier 2 TC-CCPs

Advantages	Drawbacks
<ul style="list-style-type: none"> <li>+ A simpler allocation method</li> <li>+ No need to define the most appropriate revenue</li> <li>+ No impact by revenue generation period</li> <li>+ No impact by exchange rates</li> <li>+ Leverages on tiering process</li> <li>+ More accurately reflects similar costs</li> </ul>	<ul style="list-style-type: none"> <li>- Only takes into account revenue indirectly</li> </ul>

91. Based on the above analysis, ESMA proposes a flat fee for Tier 2 TC-CCPs, considering that once a TC-CCP is systemically important, the supervisory and administrative effort will be similar, although not identical across all Tier 2 TC-CCPs.

ESMA proposes that each Tier 2 TC-CCPs pays an equal annual fee. The annual fee is determined by allocating to each Tier 2 TC-CCP an equal share of the ESMA costs<sup>5</sup>, decreased by the following fees due by TC-CCPs for the same year:

- a. One-off recognition fees, including the additional comparable compliance fee
- b. First-year fees
- c. Annual fee for Tier 1 TC-CCPs

<sup>5</sup> ESMA costs for the period 2021-2023 could include part of the EC advancement which was not covered by fees paid by TC-CCPs in 2019 and 2020.

d. One-off withdrawal fees

Notwithstanding the previous paragraph, when comparable compliance is applicable, the Tier 2 TC-CCP will receive the applicable discount.

- Q10. Do you agree in setting an equal flat fee for Tier 2 TC-CCPs instead of using the turnover represented by revenues generated by the Tier 2 TC-CCP for the purpose of calculating the Tier 2 TC-CCP fees? Please elaborate on the reasons for your response.**
- Q11. In case of considering use of revenues as more appropriate alternative, please detail whether you agree with the inclusion of (i) all revenues generated by the CCP, irrespective whether from clearing, treasury or membership linked to EU, such as those generated with regards to EU venues, EU counterparties, including their non-EU branches and non-EU subsidiaries, financial instruments, contracts and transactions cleared by the CCP where at least one of the currencies is ESCB currency or (ii) all revenues generated by the Tier 2 TC-CCP should be taken into account? Please elaborate on the reasons for your response.**

## 11 Fees for withdrawal of TC-CCP recognition

92. Article 25m of EMIR 2.2. includes a possibility for ESMA to withdraw the recognition of a TC-CCP. This provision resembles the one for trade repositories under EMIR while adding the specific cases for TC-CCPs such as impossibility for ESMA to exercise effectively its responsibilities and the suspension or withdrawal of the equivalence decision. In addition, there is a possibility to withdraw recognition only for a particular service, activity or class of financial instrument.
93. While under the current ESMA fee regulations, ESMA has not envisaged any specific fee for withdrawal of registration or recognition of TRs, the experience in implementing EMIR shows that there is a need to establish such fee. Given that the partial withdrawal of recognition would not mean that the TC-CCP will cease to service the EU, ESMA understands that there is no need to set up a specific fee for withdrawal of recognition for a particular service, activity or class of financial instrument, as the TC-CCP will continue to be supervised. However, when the recognition of the TC-CCP is withdrawn, there is a need to establish such a fee.
94. The work carried out during a full withdrawal phase is unknown, however it is expected that it will be less than the one during recognition. For the purposes of this consultation ESMA believes that the supervisory and administrative effort would be proportionate to half the work undertaken to recognise the TC-CCP. Withdrawal of recognition requires a thorough assessment and supervision of the required wind-down of services. Therefore, ESMA proposes that an entity from which recognition is withdrawn pays as withdrawal fee an amount equivalent to one half the relevant recognition fee under EMIR as amended by

EMIR 2.2. The application of comparable compliance is not relevant in this case, as when the withdrawal of recognition takes place, there is no need to consider the conditions of comparable compliance.

ESMA proposes that the following withdrawal fees under EMIR 2.2. are paid by TC-CCPs:

- A. One-off fee of 175,000 EUR for Tier 2 TC-CCPs;
- B. One-off fee of 25,000 EUR for Tier 1 TC-CCPs.

**Q12. Do you agree with the proposed fees for withdrawal of recognition of the TC-CCP?  
Please elaborate on the reasons for your response.**

## **12 Payment and reimbursement conditions under EMIR 2.2.**

### **12.1 Fees for initial recognition**

95. Similar to the established practice under other fee regulations, ESMA understands that the fees for tiering and initial recognition are due at the time of application for recognition and should be paid by TC-CCPs upon the initiation of the recognition process.
96. As mentioned in section 5, once a TC-CCP is determined not to be a Tier 1 CCP, ESMA will need to receive additional information from the Tier 2 TC-CCPs in relation to their specific conditions for recognition.
97. In this regard, ESMA understands that both Tier 1 and Tier 2 TC-CCPs pay the respective initial recognition fee once the determination of whether they are Tier 1 or Tier 2 has taken place.
98. This will result in only one payment made by TC-CCPs and it will facilitate ESMA's fee management.
99. In case an entity is determined to be Tier 2 TC-CCP, it may decide to request the application of comparable compliance. However, there is no certainty, neither an obligation, as to when the Tier 2 TC-CCP will do so. Therefore, it shall pay the initial recognition fee as soon as it is determined to be Tier 2 TC-CCP and the additional fee for the comparable compliance assessment, only when it requests this application of comparable compliance.

Under EMIR 2.2, ESMA proposes that the initial recognition fees are due from the moment of application and are paid by TC-CCPs once the tiering of the TC-CCPs has been carried out by ESMA.

In case a Tier 2 TC-CCP decides to request application of comparable compliance, ESMA proposes that this fee becomes payable at the time of the submission of the request.

**Q13. Do you agree with the proposal for the payment conditions of the applicable initial recognition fee under EMIR 2.2.? Please elaborate on the reasons for your answer.**

**Q14. Do you agree with the proposal for the payment conditions of the additional fee for comparable compliance? Please elaborate on the reasons for your answer.**

## **12.2 No reimbursement of fees in case of withdrawal of application by a TC-CCP before ESMA's recognition**

100. ESMA proposes to not reimburse fees to a TC-CCP which decides to withdraw its application before recognition is granted by ESMA. This is because the handling of its application and the preparatory work related to the tiering are costs that are being incurred already by ESMA. The same approach is taken with regards to fees for registration and extension of registration under EMIR and SFTR as well as to the application part of the recognition fee under SFTR. The main reasons supporting this proposal are the following ones:

- a. Lowering the expected cost of an incomplete process (by reimbursing a part of the fee) could allow for spurious applications, from companies aiming at providing clearing services without fulfilling a minimum set of requirements;
- b. ESMA will in such case sustain the costs of analysing all the application dossiers submitted and any follow-up action required until the withdrawal; and
- c. ESMA has to concentrate the limited resources available on the applications that carry a true intention of becoming a TC-CCP and to discourage the submission of spurious applications.

ESMA proposes to not reimburse fees to a TC-CCP that decides to withdraw its application for recognition, including before the performance of tiering.

**Q15. Do you agree with the proposal to not reimburse TC-CCPs in case they decide to withdraw their application for recognition before recognition is granted? Please elaborate on the reasons for your response.**



## 12.3 Annual fees

101. To fully support its activities vis-à-vis TC-CCPs, ESMA will need to receive their fees ahead of the start of the calendar year and no later than 31 December. This approach is aligned with the ESMA's budgeting approach outlined in section 2.
102. This means that any periodic assessment should be completed by the end of the Q3 of a given year in order to produce the relevant fees for TC-CCPs.
103. Given the frequency of performance of ESMA's activities, they will produce administrative effects and potential changes in fees only from one calendar year to another.

ESMA proposes that TC-CCPs pay their relevant annual fees by 31 December of the year preceding the one for which they are due. The fees should be calculated on the basis of the latest available information for annual fees.

- Q16. Do you agree with the proposal that TC-CCPs pay their annual fees by 31 December of the year preceding the one for which the fees are due? Please elaborate on the reasons for your response.**

## 12.4 Withdrawal of recognition

104. Following the withdrawal of recognition of a TC-CCP, this entity will no longer be subject to ESMA's supervision. Therefore, ESMA proposes that the fee for withdrawal of recognition is paid by the TC-CCP at the time at which the process included under Article 25m is initiated. In case the withdrawal is requested by the TC-CCP, then the fee should be paid by the TC-CCP at the point in time when it requests the withdrawal of recognition.
105. ESMA proposes that if the recognition is finally not withdrawn, no reimbursement will take place.

ESMA proposes that TC-CCPs pay the relevant withdrawal fee at the time of initiation of the process for withdrawal pursuant to Article 25m.

- Q17. Do you agree with the proposal that TC-CCPs pay the relevant withdrawal fee at the time of initiation of the process for the adoption of ESMA's decision on withdrawal? Please elaborate on the reasons for your response.**

## 12.5 2019 and 2020 TC-CCP fees

106. While it is expected that EMIR 2.2. enters into force in Q4 2019, the relevant delegated act on fees of the EC could be adopted, pursuant to Article 82 EMIR, only at the beginning of 2020.

107. ESMA proposes that the relevant 2019 fees are paid by the TC-CCPs once the delegated act on fees enters into force. This means that if the delegated act is adopted in 2020, ESMA would charge in 2020 the relevant 2019 fees.

108. Similarly, the 2020 fees should be paid to ESMA following the entry into force of the delegated act on fees.

109. In case a TC-CCP applies for recognition or its pending application for recognition ceases to be suspended before the entry into force of the delegated act on fees, and its determination of being Tier 1 or Tier 2 is completed before such entry into force of the delegated act on fees, then the TC-CCP entity should pay the fees once the delegated act enters into force. Otherwise, the entity should pay its one-off recognition fees as detailed in section 12.1, i.e. following the completion of the tiering.

**Q18. Do you agree with the proposal for the timing of payment of the 2019 and 2020 fees? Please elaborate on the reasons for your response.**

## 13 Annexes

### 13.1 Annex 1 Summary of questions

Q1. Do you agree with the proposed one-off fees for initial recognition for Tier 2 TC-TC CCPs? Please elaborate on the reasons for your answer.

Q2. Do you agree with the proposed one-off fees for initial recognition for Tier 1 TC-TC CCPs? Please elaborate on the reasons for your answer.

Q3. Do you agree with the payment by a Tier 1 TC-CCP that becomes Tier 2 TC-CCP of the difference between the two fees? Please elaborate on the reasons for your answer.

Q4. Do you agree with the approach for determining the fees in 2019 for recognised or applicant TC-CCPs? Please elaborate on the reasons for your response.

Q5. Do you agree with the approach for determining the fees in 2020 and until end of transition period for recognised or applicant TC-CCPs? Please elaborate on the reasons for your response.

Q6. Do you prefer Option A or Option B as an approach towards establishment of fees and discounts for comparable compliance? Please elaborate on the reasons for your response.

Q7. Do you agree with the proposed approach to calculate first-year fees for TC-CCPs under EMIR 2.2? Please elaborate on the reasons for your answer.

Q8. Do you agree with the proposed approach for the calculation of annual fees? Please elaborate on the reasons for your response.

Q9. Do you agree with the proposed amount of annual fees for Tier 1 TC-CCPs recognised under EMIR 2.2? Please elaborate on the reasons for your answer.

Q10. Do you agree in setting an equal flat fee for Tier 2 TC-CCPs instead of using the turnover represented by revenues generated by the Tier 2 TC-CCP for the purpose of calculating the Tier 2 TC-CCP fees? Please elaborate on the reasons for your response.

Q11. In case of considering use of revenues as more appropriate alternative, please detail whether you agree with the inclusion of (i) all revenues generated by the CCP, irrespective whether from clearing, treasury or membership linked to EU, such as those generated with regards to EU venues, EU counterparties, including their non-EU branches and non-EU subsidiaries, financial instruments, contracts and transactions cleared by the CCP where at least one of the currencies is ESCB currency or (ii) all revenues generated by the Tier 2 TC-CCP should be taken into account? Please elaborate on the reasons for your response.

Q12. Do you agree with the proposed fees for withdrawal of recognition of the TC-CCP? Please elaborate on the reasons for your response.

Q13. Do you agree with the proposal for the payment conditions of the applicable initial recognition fee under EMIR 2.2.? Please elaborate on the reasons for your answer.

Q14. Do you agree with the proposal for the payment conditions of the additional fee for comparable compliance? Please elaborate on the reasons for your answer.

Q15. Do you agree with the proposal to not reimburse TC-CCPs in case they decide to withdraw their application for recognition before recognition is granted? Please elaborate on the reasons for your response.

Q16. Do you agree with the proposal that TC-CCPs pay their annual fees by 31 December of the year preceding the one for which the fees are due? Please elaborate on the reasons for your response.

Q17. Do you agree with the proposal that TC-CCPs pay the relevant withdrawal fee at the time of initiation of the process for the adoption of ESMA's decision on withdrawal? Please elaborate on the reasons for your response.

Q18. Do you agree with the proposal for the timing of payment of the 2019 and 2020 fees? Please elaborate on the reasons for your response.

## 13.2 Annex II

### Commission mandate to provide technical advice

#### 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.

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

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

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<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.

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

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 25bb 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-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 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.

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<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.

- 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:
  - o the relevant provision of the Regulation as amended;
  - o the corresponding recitals, or;
  - o 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 25bb 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 25bb 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 25bb 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.