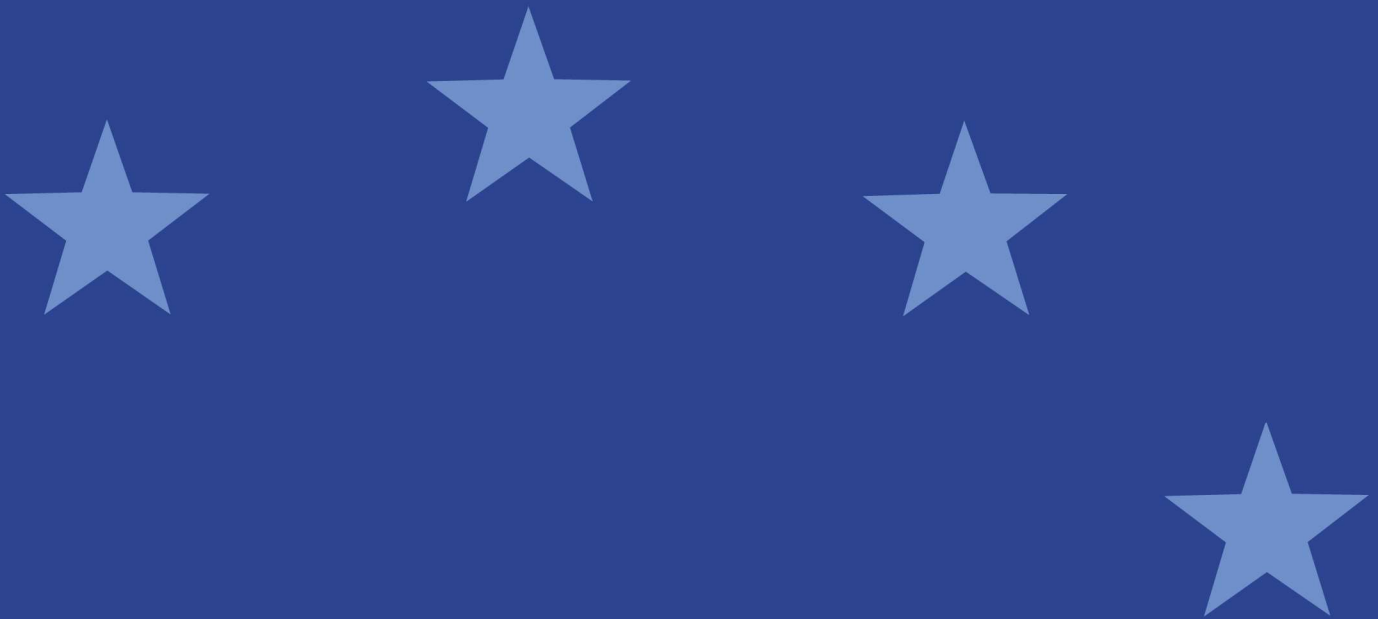




European Securities and  
Markets Authority

# Consultation Report

**Technical Advice on Comparable Compliance under article 25a of EMIR**



## Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 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 **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

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from central counterparties (CCPs), clearing members and clients of clearing members.

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# 1 Executive Summary

## Reasons for publication

This paper is published to consult on ESMA's draft technical advice to the European Commission for its adoption of a Delegated Act on comparable compliance, in accordance with Article 25a(3) of Regulation (EU) No 648/2012 as amended under EMIR2.2.

## Contents

Section 1 presents the Executive Summary of the report. Section 2 explains the background to our proposals. Section 3 discusses what and how ESMA should assess to apply comparable compliance, in order to identify the main aspects to be detailed in the Commission's Delegated Act on comparable compliance.

Section 4 presents the content of ESMA's draft technical advice, encompassing the minimum elements to be assessed, the conditions and modalities to carry out the assessment, including the information to be provided in the CCP's reasoned request for comparable compliance that will be considered for that assessment.

Annex I presents a cost-benefit analysis of the approaches proposed in the ESMA technical advice, Annex II lists ESMA's consultation questions, Annex III includes the Commission's request to ESMA for this technical advice, and Annex IV presents an exemplification of how the draft technical advice on comparable compliance could be transposed in the Commission's Delegated Act.

## Next Steps

ESMA will consider the feedback it received to this consultation and expects to publish a final report and submission of the technical advice to the European Commission in Q3 2019.

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## 2 Introduction

1. 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 (EU) No 648/2012 (EMIR<sup>1</sup>). While the legislative process for the adoption of the proposed regulation amending EMIR (EMIR 2.2<sup>2</sup>) 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).
2. EMIR 2.2 introduces a new category of TC CCPs, namely the systemically important or likely to become systemically important CCPs (Tier 2 CCPs), which in order to be recognised under Article 25 of EMIR, have to comply, among other things, with the EMIR requirements set out in Article 16 and in Titles IV and V of EMIR (see new Article 25(2b)(a) of EMIR<sup>3</sup>).
3. EMIR 2.2 also introduces a new system under which a Tier 2 CCP may be deemed to satisfy compliance with the requirements referred to in Article 25(2b)(a) of EMIR by complying with the regulations and requirements of its own third country. The new procedure therefore envisages the possibility for Tier 2 CCPs to request ESMA to assess “comparable compliance”, i.e. the extent to which a CCP's compliance with EMIR requirements, as set out in Article 16 (CCP capital requirements) and in Title IV (CCP requirements, including organisational, conduct of business, and prudential requirements) and Title V (requirements on interoperability arrangements) of EMIR – thereafter referred to altogether as “EMIR requirements”, is satisfied by the CCP's compliance with the comparable requirements applicable in the third country (see new Article 25a(1) of EMIR).
4. The new Article 25a(3) of EMIR mandates the Commission 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 Commission shall endeavour to consult ESMA before adopting such a delegated act.
5. Accordingly, on 3 May 2019, ESMA received a request from the Commission to provide a technical advice on the possible content of this delegated act. The request is enclosed in Annex II in this paper.
6. This report presents ESMA's draft technical advice for public consultation. Section 3 discusses how and what ESMA should assess to apply comparable compliance, in order to identify the main aspects to be detailed in the Commission's Delegated Act on

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<sup>1</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 Text with EEA relevance - OJ L 201, 27.7.2012, p. 1

<sup>2</sup> Regulation (EU) 2019/... of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, which is currently subject to legal revision and translation prior to its publication in the EU Official Journal. The version approved by the European Parliament on 18 April 2019 is available at [http://www.europarl.europa.eu/doceo/document/TA-8-2019-0438\\_EN.html?redirect#title2](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0438_EN.html?redirect#title2).

<sup>3</sup> All references to Articles of EMIR in this report are to be considered as reference to Articles of EMIR as amended by EMIR 2.2.

comparable compliance. Section 4 discusses the content of the Commission's Delegated Act. A cost-benefit analysis of the approaches proposed in the technical advice is presented in Annex I. An exemplification of how the draft technical advice on comparable compliance could be transposed in the Commission's Delegated Act is presented in Annex IV. Annex III lists the questions for consultation.

7. Box 1 below presents the respective Recital in EMIR 2.2 and the relevant provisions in Articles 25 and 25a of EMIR referring to "comparable compliance".

### **Box 1: Recital and Articles of EMIR on Comparable Compliance**

#### **Recital (41)**

At the request of a Tier 2 CCP, ESMA should also be able to take into account the extent to which the compliance of a systemically-important third-country CCP with the requirements applicable in that third country can be compared to the compliance of that CCP with the requirements of Regulation (EU) No 648/2012. When conducting that assessment, ESMA should take into account the implementing act adopted by the Commission determining that the legal and supervisory arrangements of the third country where the CCP is established are equivalent to those of this Regulation and any conditions to which the application of that implementing act may be subject. In order to ensure proportionality, ESMA should also consider, when conducting that assessment, the extent to which the financial instruments cleared by the CCP are denominated in Union currencies. The Commission should adopt a delegated act specifying further the modalities and conditions to assess such comparable compliance.

#### **Article 25 – Recognition of a Third Country CCP**

[...]

2b. Where ESMA determines a CCP to be systemically important or likely to become systemically important (Tier 2 CCP) in accordance with paragraph 2a, it shall only recognise that CCP to provide certain clearing services or activities where, in addition to the conditions referred to in Article 25(2)(a), (b), (c) and (d), the following conditions are fulfilled:

(a) the CCP complies, at the moment of recognition and thereafter on an ongoing basis, with the requirements set out in Article 16 and in Titles IV and V. With regard to the CCP's compliance with Articles 41, 44, 46, 50 and 54 ESMA shall consult the central banks of issue referred to in point (f) of paragraph 3 in accordance with the procedure set out in the second subparagraph of Article 24b(1). ESMA shall take into account, in accordance with Article 25a(2), the extent to which a CCP's compliance with those requirements is satisfied by its compliance with the comparable requirements applicable in the third country; [...]

#### **Article 25a - Comparable compliance**

1. A CCP referred to in Article 25(2b)(a) may submit a reasoned request that ESMA assesses whether in its compliance with the applicable third country framework, taking into account the provision of the implementing act adopted in accordance with Article 25(6), that CCP may be deemed to satisfy compliance with the requirements referred to in Article 25(2b)(a) and set out in Article 16 and Titles IV and V. ESMA shall immediately transmit the request to the ESMA third country CCP College.

2. The request referred to in paragraph 1 shall provide the factual basis for a finding of comparability and the reasons why compliance with the requirements applicable in the third country satisfies the requirements set out in Article 16, Titles IV and V.

3. The Commission, in order to ensure that the assessment referred to in paragraph 1 effectively reflects the regulatory objectives of the requirements set out in Article 16 and Titles IV and V and the Union's interests as a whole, shall adopt a delegated act to specify the following:

(a) the minimum elements to be assessed for the purposes of paragraph 1;

(b) the modalities and conditions to carry out the assessment.

The Commission shall adopt the delegated act referred to in the first subparagraph in accordance with Article 82 within [12 months from the entry into force of this Regulation].

## 3 ESMA's assessment for comparable compliance

### 3.1 Equivalence versus Comparable Compliance

8. A condition for the recognition of TC CCPs is the adoption by the Commission of an implementing act (the so-called “equivalence decision”) determining that: (i) the legal and supervisory arrangements of a third country ensure that CCPs authorised in that third country comply with legally binding requirements which are equivalent to the requirements laid down in Title IV of EMIR; (ii) that those CCPs are subject to effective supervision and enforcement in that third country on an ongoing basis; and (iii) the legal framework of that third country provides for an effective equivalent system for the recognition of CCPs authorised under third-country legal regimes.
9. Equivalence decisions are based on an outcome-based assessment of the full set of requirements applying at jurisdiction level, including, where relevant, proportionality considerations, e.g. taking into account the relative importance of the services provided in the Union by the CCPs established in that third country. So far, where major gaps/differences emerged between the requirements applying in a third country and the requirements in Title IV of EMIR (which could not be neglected on the basis of proportionality considerations), the Commission included in its equivalence decision specific conditions addressing those gaps/differences, which the CCPs established in that third country have to comply with (on an ongoing basis) in order to be recognised by ESMA.
10. Since the equivalence of requirements in a third country is already determined by the Commission's equivalence decision, the assessment to be conducted by ESMA for the comparable compliance is expected to be of a different nature than that for the equivalence decision.
  - First, the ESMA's assessment for comparable compliance should be done **at CCP level (entity-based)**, while the Commission's equivalence decision is done at the level of the jurisdiction.
  - Second, the condition under Article 25(2b)(a) of EMIR for recognition of a Tier 2 CCP is that the CCP complies, at the moment of recognition and thereafter on an ongoing basis, with the EMIR requirements, and ESMA shall consider if the CCP's compliance may be satisfied by compliance with third country requirements. Hence, ESMA's assessment should imply a more detailed comparative analysis of the requirements applying in the third country against the EMIR requirements on a **requirement-by-requirement basis**, while the Commission's equivalence decision overall compares the EMIR and third country's regulatory and supervisory framework as a whole.
11. In particular, ESMA's assessment should determine “the extent to which” a CCP's compliance with EMIR requirements is satisfied by its compliance with the comparable requirements in the third country, whereby certain EMIR requirements may be substituted while some others might not.

12. An analysis at CCP level cannot exclude a scenario where, for the same third country, one CCP is granted comparable compliance with EMIR while another CCP is not. Such a situation may occur for instance where these two Tier 2 CCPs clear different classes of financial instruments and the third country requirements are deemed comparable to EMIR requirements with respect to the class of financial instruments cleared by one of the CCPs though are not deemed comparable, or are even non-existent, with respect to the class of financial instruments cleared by the other CCP.
13. Another instance could materialise with respect to a third country where the CCP's internal rules and procedures form, in that jurisdiction, an integral part of the legal and supervisory arrangements with which CCPs established in that country must comply (as evidenced in the respective Commission's equivalence decision). In such a jurisdiction, requirements laid down in internal rules and procedures, could be considered as a second layer of the legally binding requirements for the purpose of comparable compliance (in a similar way they were considered for the purpose of the equivalence decision). However, as requirements laid down in rules and procedures may vary across CCPs, the determination of comparable compliance for specific requirements could be granted to one CCP but not to another within the same jurisdiction.
14. The Delegated Act could clarify that, where the CCP's internal rules and procedures form, in a given jurisdiction, an integral part of the legal and supervisory arrangements with which CCPs established in that third country must comply, requirements laid down in such internal rules and procedures, being legally binding, are to be considered as a second layer of the legally binding requirements for the purpose of comparable compliance (in a similar way they are considered for the purpose of the equivalence decision).
15. The *requirement-by-requirement* approach for comparable compliance would allow ESMA to apply comparable compliance for all those requirements in the third country which are considered to be (i) equal or at least as strict or conservative as the corresponding EMIR requirements, or (ii) anyway "comparable", i.e. where the requirements in the third country can be accepted as a substitute for the corresponding EMIR requirements because they achieve the same regulatory objective.
16. ESMA's recognition assessment, and following supervisory activities, should ascertain that the Tier 2 CCP complies with those remaining EMIR requirements which have no corresponding comparable requirements in the third country regulatory framework. However, when specific conditions have been introduced in the equivalence decision to address differences with specific EMIR requirements, ESMA needs to ensure that the CCP complies with those conditions instead.



17. The wording of Article 25(2b)(a) of EMIR supports an approach based on a requirement-by-requirement comparison. This reading is also supported by the explanatory memo<sup>4</sup> accompanying the Commission initial proposal on EMIR 2.2.
18. In any case, the fact that ESMA may consider that compliance with certain EMIR requirements is satisfied by the compliance with the comparable requirements applicable in the third country does not limit ESMA's supervisory powers over the recognised Tier 2 CCPs. Indeed, to assess and ensure compliance with EMIR via such comparable requirements, ESMA may request the CCP to provide information in accordance with Article 25c of EMIR, initiate general investigations or on-site inspections in accordance with Articles 25d and 25e thereof, and adopt any necessary supervisory measures for the enforcement of EMIR requirements in accordance with Articles 25f to 25n thereof, independently from or in cooperation with the third country supervisory authority.
19. Indeed, it cannot be excluded that the application of comparable requirements leads in practice to different supervisory outcomes. ESMA should retain in all cases its supervisory powers to monitor compliance with EMIR via the comparable requirements. ESMA should independently assess, on a case-by-case basis, whether to rely or not on the third country supervision of the CCP compliance with the comparable requirements, and to review its assessment at its discretion depending on the developments and practical experience of cooperating with the third country authority. Equally, should different outcomes then be identified, ESMA would retain its supervisory powers to ensure that EMIR is complied with and may revise its approach toward comparable compliance, if necessary.

### 3.2 How to assess comparability

20. A key question, when assessing whether a requirement applying to a Tier 2 CCP in a third country is comparable with a corresponding requirement in EMIR, is whether the former has to be identical to the latter. The wording of Article 25a(3) of EMIR suggests that a third country requirement could be accepted as “comparable” even if not identical to the EMIR requirement provided that the third country requirement achieves the regulatory objectives of the EMIR requirement and is not against the Union's interests as a whole, in accordance with the modalities and conditions to be specified in the Commission's Delegated Act. Hence, a more restrictive interpretation than the one mentioned above, whereby any requirement in the third country would be considered non-comparable if it is not equal or at least as strict as (for quantitative requirements), or at least as conservative as (for qualitative requirements) the corresponding EMIR requirement, would not be in accordance with Article 25a(3) of EMIR, where such requirements still achieve the

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<sup>4</sup> The explanatory memo accompanying the Commission initial proposal on EMIR 2.2 states, in the second last paragraph on page 25, that “*This new system of comparable compliance – which complies with FSB standards and reflects a similar system applied by the US authorities – relies on a simple procedure under which the third-country CCP can request ESMA to compare EMIR's requirements and EU supervisory standards for CCPs with those of the third country. Where comparable, ESMA may determine that the application of some or all of the requirements in place as well as the corresponding supervisory enforcement in that third country<sup>4</sup> provides a comparable outcome to the application of EMIR and waive the application of corresponding EMIR provision. This approach will significantly reduce any burdens resulting from dual application of rules and requirements.*” - see [http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/com/2017/0331/COM\\_COM\(2017\)0331\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2017/0331/COM_COM(2017)0331_EN.pdf)

regulatory objectives. The Delegated Act will have to set the boundaries below which a third country requirement cannot be considered comparable with an EMIR requirement.

21. In order to implement the above, following a reasoned request by a Tier 2 CCP, ESMA's assessment could include a **four-step approach**:

- Step 1: a **mapping** of the legally binding requirements applying to a Tier 2 CCP in the third country, for which comparable compliance has been requested<sup>5</sup>, against the EMIR requirements, to ascertain whether there are gaps, beyond those addressed by specific conditions in the equivalence decision;

ESMA would conduct this mapping on the basis of an initial analysis to be provided by the requesting Tier 2 CCP (if deemed necessary, together with a certified translation of the third country requirements, supporting legal opinions, and an opinion of the respective third country authority).

- Step 2: a **comparative analysis** identifying those requirements in the third country which are equal or at least as strict as (for quantitative requirements), or at least as conservative as (for qualitative requirements) the corresponding EMIR requirements, so that compliance with the former would result in compliance with the latter;

ESMA would conduct this comparative analysis taking into account the reasons provided by the requesting Tier 2 CCPs explaining why compliance with a certain third country requirement satisfies the corresponding EMIR requirement.

- Step 3: a qualitative **"comparability" analysis** of those other requirements in the third country, which are considered to be different from the corresponding EMIR requirements (because less granular or prescriptive, or implementing alternative regulatory approaches) and whose comparative conservativeness is difficult to assess at all times. This analysis should determine whether, despite the identified differences, such requirements could be considered or not "comparable", taking into account whether they substantially achieve the regulatory objectives of the corresponding EMIR requirements and effectively reflect the Union's interests as a whole.

ESMA would conduct this analysis according to the Commission's Delegated Act specifying the minimum elements to be assessed and further guidance for the purposes of comparable compliance assessment, as further discussed in Section 4.

- Step 4: **final determination** will be based on the outcome of the previous steps and taking into account the gaps identified in Step 1 and the non-comparable requirements identified in Step 3. Where comparable requirements are identified, ESMA would determine that the application of such requirements provides a comparable outcome to

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<sup>5</sup> The mapping will focus on the requirements for which the Tier 2 CCP has requested comparable compliance. A reasoned request could be only on a subset of the EMIR requirements (or even on one specific requirement) and the assessment should be as per the scope requested by the Tier 2 CCP.

the application of the corresponding EMIR requirements and would, as long as this assessment remains valid, rely on compliance with the third country requirements for the compliance of the corresponding EMIR provisions.

ESMA would reach this final determination according to the Commission's Delegated Act specifying the modalities and conditions to carry out its assessment.

When ESMA proposes to reject the request for comparable compliance with respect to a given EMIR requirement, it could seek the views of the CCP and/or the third country competent authority before finalising its determination.

**Q1: Do you agree on the overall approach proposed for ESMA's assessment for comparable compliance? What other considerations should be reflected in the assessment for comparable compliance?**

**Q2: Do you agree that ESMA should accept a requirement in a third country as comparable to a corresponding requirement under EMIR where it is assessed to be, on an outcome basis, equal or at least as strict or conservative as the corresponding requirement under EMIR?**

## **4 Content of the Commission's delegated act**

22. In accordance with Article 25a(3) of EMIR, the Commission, in order to ensure that ESMA's assessment effectively reflects the regulatory objectives of the requirements set out in Article 16 and Titles IV and V of EMIR and the Union's interests as a whole, shall adopt a delegated act to specify the following:

- a. the minimum elements to be assessed for the purposes of comparable compliance; and
- b. the modalities and conditions to carry out the assessment.

### **4.1 The minimum elements**

23. The minimum elements to be assessed should be defined within each EMIR requirement.

24. The Commission's Delegated Act could identify the minimum elements, i.e. a set of core provisions in each EMIR requirement, that need to be satisfied by corresponding regulatory provisions applying in the third country in order for ESMA to assess such requirement in the third country as "comparable". Provisions applying in a third country would not need to be literally identical to such core provisions of EMIR, but should be, on an outcome-basis, equal or at least as strict as (for quantitative requirements), or at least as conservative as (for qualitative requirements) the identified core provisions.

25. With respect to the comparability analysis (Step 3 above), where a third country requirement can be similar, being on average, but not always, equal or at least as strict as

(for quantitative requirements), or at least as conservative as (for qualitative requirements) the core provisions, it could still be considered to be “comparable” provided that the Tier 2 CCP adopts the corresponding EMIR requirement as a floor or minimum, through adequate rules, policies and procedures. In this case, any significant change to these rules, policies and procedures should be notified to ESMA, who can reassess the comparability of the respective requirement as appropriate.

26. While identifying the core provisions, the delegated act could also consider provisions from the relevant articles in regulatory technical standards (RTS) specifying certain aspects of the EMIR requirements, such as the Commission Delegated Regulation (EU) No 152/2013<sup>6</sup> on capital requirements (RTS 152/2013) and Commission Delegated Regulation (EU) No 153/2013<sup>7</sup> on CCP requirements (RTS 153/2013).
27. Table 1 below presents the core provisions that are proposed as the minimum elements to be assessed for comparative compliance with EMIR requirements. This table could be annexed to the Delegated Act. It includes those key provisions under each EMIR requirement that a Tier 2 CCP has strictly to comply with in the interest of the Union, in order to maintain the required level of resilience to operate in the Union on a single level-playing field with other Tier 2 CCPs (with and without comparable compliance) and EU-CCPs. These provisions generally implement key considerations and some more granular provisions of the CPMI-IOSCO Principles for Financial Market Infrastructures.
28. Third country jurisdictions that have adopted these same principles for CCPs are expected to have corresponding provisions in their regulatory framework, although the level of granularity may differ – which should facilitate a positive ESMA’s assessment for comparable compliance. The assessment might be less obvious in those few cases where EMIR has adopted a more conservative requirement among the approaches considered in the principles, e.g. on capital requirements or the level of coverage of total resources for credit risk and liquidity risk.
29. The Articles 50a-50d of EMIR on the calculations and reporting for the purposes of Regulation (EU) No 575/2013 have also been included among the core provisions in Table 1 in order to ensure that EU clearing members in Tier 2 CCPs are able to comply with their capital requirements under that regulation.

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<sup>6</sup> Commission Delegated Regulation (EU) No 152/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on capital requirements for central counterparties Text with EEA relevance - OJ L 52, 23.2.2013, p. 37

<sup>7</sup> Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties Text with EEA relevance - OJ L 52, 23.2.2013, p. 41

Table 1: Core provisions as minimum elements to be assessed for comparable compliance (Annex I to the Delegated Act)

CCP Requirements	EMIR Provisions	RTS
<b>Capital requirements</b>	Art 16(1)-(2) EMIR	Art 1 (1)-(2) RTS 152/2013 Art 2 (1)-(3) RTS 152/2013 Art 3 (3)-(5) RTS 152/2013 Art 5 (1)-(2) RTS 152/2013
<b>Organisational requirements</b>		
Governance arrangements and Risk controls and internal mechanisms	Art 26(1) EMIR	Art 3(1)-(3), (6) RTS 153/2013 Art 4 RTS 153/2013
Compliance policy and procedures and Compliance function	Art 26(2) EMIR	Art 5(1)-(2), (4) RTS 153/2013 Art 6 RTS 153/2013
Organisation structure and separation of reporting lines	Art 26(3)-(4) EMIR	Art 7(1)-(3), (5)-(6) RTS 153/2013
Remuneration Policy	Art 26(5) EMIR	
Information technology systems	Art 26(6) EMIR	Art 9 RTS 153/2013
Disclosure	Art 26(7) EMIR	
Internal auditing	Art 26(8) EMIR	Art 11 RTS 153/2013
Senior management and Board	Art 27 EMIR	
Risk Committee	Art 28(1)-(4) EMIR	
Record Keeping	Art 29 EMIR	Art 12(1), (7) RTS 153/2013 Art 13 RTS 153/2013 Art 14 RTS 153/2013 Art 15 RTS 153/2013 Art 16 RTS 153/2013
Shareholder assessment	Art 30 EMIR Art 31(1), (2) EMIR Art 32(1), (3)-(4), (7) EMIR	
Conflict of Interest	Art 33 EMIR	
Business Continuity	Art 34 EMIR	Art 17 RTS 153/2013 Art 18 RTS 153/2013 Art 19 RTS 153/2013 Art 20 RTS 153/2013 Art 21 RTS 153/2013 Art 22 RTS 153/2013 Art 23 RTS 153/2013
Outsourcing	Art 35 EMIR	
<b>Conduct of Business</b>		
General provisions	Art 36(1) EMIR	
Participation requirements	Art 37 EMIR	
Transparency	Art 38 EMIR	
Segregation and Portability	Art 39 EMIR	
<b>Prudential requirements</b>		
Exposure management	Art 40 EMIR	
Margin requirements	Art 41 EMIR	Art 24 RTS 153/2013 Art 25 RTS 153/2013 Art 26 RTS 153/2013 Art 27 RTS 153/2013 Art 28(2) RTS 153/2013

Default Fund	Art 42(1)-(4) EMIR	Art 29 RTS 153/2013 Art 30 RTS 153/2013 Art 31 RTS 153/2013
Other financial resources	Art 43 EMIR	
Liquidity risk controls	Art 44(1) EMIR	Art 32(1)-(6) RTS 153/2013 Art 33(1)-(6) RTS 153/2013 Art 34(1)-(3) RTS 153/2013
Default waterfall	Art 45(1)-(4) EMIR	Art 35(1)-(4) RTS 153/2013 Art 36(1)-(3) RTS 153/2013
Collateral requirements	Art 46(1)-(2) EMIR	Art 37 RTS 153/2013 Art 38 RTS 153/2013 Art 39 RTS 153/2013 Art 40(1)-(2) RTS 153/2013 Art 41(1)-(3) RTS 153/2013 Art 42(1)-(9) RTS 153/2013
Investment Policy	Art 47(1)-(7) EMIR	Art 43 RTS 153/2013 Art 44(1)-(3) RTS 153/2013 Art 45(1), (2) RTS 153/2013 Art 45a(1)-(7) RTS 153/2013 Art 46 RTS 153/2013
Default procedures	Art 48 (1)-(4) EMIR	
Review of models, stress testing and back testing	Art 49(1)-(3) EMIR	Art 47 RTS 153/2013 Art 48 RTS 153/2013 Art 49 RTS 153/2013 Art 50 RTS 153/2013 Art 51 RTS 153/2013 Art 52 RTS 153/2013 Art 53 RTS 153/2013 Art 54 RTS 153/2013 Art 55 RTS 153/2013 Art 56 RTS 153/2013 Art 57 RTS 153/2013 Art 58 RTS 153/2013 Art 59 RTS 153/2013 Art 60 RTS 153/2013 Art 61 RTS 153/2013
Settlement	Art 50 EMIR	
Calculations and reporting for the purposes of Regulation (EU) No 575/2013	Art 50a-50d of EMIR	
<b>Interoperability arrangements</b>	Art 52 EMIR Art 53 EMIR	

**Q3: Do you agree that the minimum elements to be specified in the Commission's delegated act should include the core provisions listed in Table 1? What other considerations should be included as minimum elements of the assessment?**

**Q4: Do you agree that, where a third country requirement can be on average, but not always, equal or at least as strict or conservative as the core provisions listed in Table 1, it can still be accepted as comparable provided that the Tier 2 CCP adopts the**

**corresponding EMIR requirement as a floor or minimum requirement, through adequate rules, policies and procedures?**

30. The provisions that are not included in the minimum elements listed above (i.e. the non-core provision) would in general include provisions that either:
- a) implement international standards, such as the CPMI-IOSCO Principles for Financial Market Infrastructures, adopting a EU-specific approach, where it is acknowledged that there might be other equally appropriate alternative approaches achieving the same regulatory objective (e.g. in the case of anti-pro-cyclicality options: Article 28(1) of Delegated Regulation (EU) No153/2013);
  - b) refer to EU-specific regulations, approval procedures (e.g. validation or opinion by ESMA) or institutional functions (e.g. colleges);
  - c) do not introduce a requirement but rather prescribe that a CCP shall “take into account” or “consider” something (e.g. implications of the group a CCP may belong to: Article 3(4) of Delegated Regulation (EU) No153/2013);
  - d) address a specific case which may not be relevant for all CCPs or jurisdictions (e.g. a CCP adopting a two-tier board structure: Article 3(5) of Delegated Regulation (EU) No153/2013); or
  - e) may conflict with national laws in a third country jurisdiction, in which case an alternative approach can be accepted on an exceptional basis (e.g. where in a jurisdiction a CCP is prevented by law to provide individually segregated client accounts: Article 39(3) of EMIR).
31. With respect to the comparability analysis (Step 3 above), when assessing the comparability of these other provisions not included in the minimum elements/core provisions, the assessment should take into account the regulatory objective of those provisions in accordance with the guidance provided in the Delegated Act.
32. Table 2 below presents the guidance for assessing comparability with the specific provisions not included in the minimum elements or core provisions as listed above. This table could be annexed to the Delegated Act.

**Q5: Do you agree that, when a third country requirement is similar but not always equal or at least as strict or conservative as the provisions not included in the minimum elements and listed in Table 2, it can still be considered to be comparable where it substantially achieves the respective regulatory objectives in accordance with the guidance specified in Table 2?**

Table 2: Guidance on other provisions not included in the minimum elements (Annex II to the delegated act)

EMIR Provisions	Guidance for assessing comparability
<b>Capital requirements</b>	
<p>Art 1 (3)-(4) RTS 152/2013</p> <p>3. If the amount of capital held by a CCP according to paragraph 1 is lower than 110 % of the capital requirements or lower than 110 % of EUR 7,5 million ('notification threshold'), the CCP shall immediately notify the competent authority and keep it updated at least weekly, until the amount of capital held by the CCP returns above the notification threshold.</p> <p>4. That notification shall be made in writing and shall contain the following elements:</p> <p>(a) the reasons for the CCP's capital being below the notification threshold and a description of the short-term perspective of the CCP's financial situation;</p> <p>(b) a comprehensive description of the measures the CCP intends to adopt to ensure the on-going compliance with the capital requirements.</p>	<p>A TC requirement can be considered comparable also if it applies a different buffer and notification procedure, as long as it ensures that there are a notification threshold, a notification process and corrective measures.</p>
<p>Art 2(4) RTS 152/2013</p> <p>For the purposes of this Article, operational expenses shall be considered in accordance with International Financial Reporting Standards (IFRS) adopted pursuant to Regulation (EC) No 1606/2002 or, in accordance with Council Directives 78/660/EEC (1), 83/349/EEC (2) and 86/635/EEC (3) or, in accordance with generally accepted accounting principles of a third country determined to be equivalent to IFRS in accordance with Commission Regulation (EC) No 1569/2007 (4) or accounting standards of a third country the use of which is permitted in accordance with Article 4 of that Regulation, as applicable. CCPs shall use the most recent audited information from their annual financial statement.</p> <p>Art 3(1), (2), (6), (7) RTS 152/2013</p> <p>1. A CCP shall calculate its capital requirements for operational — including legal — risk referred to in Article 1 using either the Basic Indicator Approach or Advanced Measurement Approaches as provided in Directive 2006/48/EC subject to the restrictions provided in paragraphs 2 to 7.</p> <p>2. A CCP may use the basic indicator approach in order to calculate its capital requirements for operational risk in accordance with Article 103 of Directive 2006/48/EC.</p>	<p>TC capital requirements can refer to respective requirements applicable in the third country jurisdiction on accounting rules and risk models in replacement of IFRS and CRR requirements.</p>



6. A CCP may also apply to its competent authority for permission to use Advanced Measurement Approaches. The competent authority may grant the CCP the permission to use Advanced Measurement Approaches based on its own operational risk measurement systems in accordance with Article 105 of Directive 2006/48/EC.

7. CCPs using the Advanced Measurement Approaches as specified in paragraph 6 for the calculation of their capital requirements for operational risk shall hold capital which is at all times more than or equal to 80 % of the capital required using the basic indicator approach according to paragraph 2.

#### Art 4 RTS 152/2013

1. A CCP shall calculate its capital requirements referred to in Article 1 as the sum of 8 % of its risk-weighted exposure amounts for credit and counterparty credit risk and its capital requirements for market risk calculated in accordance with Directives 2006/48/EC and 2006/49/EC, subject to the restrictions provided in paragraphs 2 to 5.

2. For the calculation of capital requirements for market risk which is not already covered by specific financial resources as referred to in Articles 41 to 44 of Regulation (EU) No 648/2012, a CCP shall use the methods provided for in Annexes I to IV to Directive 2006/49/EC.

3. For the calculation of the risk-weighted exposure amounts for credit risk which is not already covered by specific financial resources as referred to in Articles 41 to 44 of Regulation (EU) No 648/2012, a CCP shall apply the Standardised Approach for credit risk provided for in Articles 78 to 83 of Directive 2006/48/EC.

4. For the calculation of the risk-weighted exposure amounts for counterparty credit risk which is not already covered by specific financial resources as referred to in Articles 41 to 44 of Regulation (EU) No 648/2012, a CCP shall use the Mark-to-market Method provided for in Annex III, part 3 to Directive 2006/48/EC and the Financial Collateral Comprehensive Method applying supervisory volatility adjustments provided for in Annex VIII, Part 3 to Directive 2006/48/EC.

5. Where all the conditions referred to in Articles 52 and 53 of Regulation (EU) No 648/2012 are not fulfilled and where a CCP does not use its own resources, the CCP shall apply a risk weight of 1 250 % to its exposure stemming from contributions to the default fund of another CCP and a risk weight of 2 % to its trade exposures with another CCP.

<b>Organisational Requirements</b>	
<p>Art 3(3) RTS 153/2013 A CCP shall ensure that the functions of [...] chief technology officer are carried out by an individual [other than the Chief Risk Officer and Chief Compliance Officer] who shall be an employee of the CCP entrusted with the exclusive responsibility of performing this function.</p>	<p>Where no chief technology officer is required in TC regulatory requirements, it might be sufficient that a TC-CCP explains in its request for comparable compliance who has the exclusive responsibility to ensure compliance with comparable requirements on information technology systems and business continuity, irrespective of the title of his/her position.</p>
<p>Art 3(4) RTS 153/2013 A CCP that is part of a group shall take into account any implications of the group for its own governance arrangements including whether it has the necessary level of independence to meet its regulatory obligations as a distinct legal person and whether its independence could be compromised by the group structure or by any board member also being a member of the board of other entities of the same group. In particular, such a CCP shall consider specific procedures for preventing and managing conflicts of interest including with respect to outsourcing arrangements.</p>	<p>Art 3(4) RTS prescribes that a CCP shall “take into account” or “consider”, it would be sufficient that a TC-CCP explains in its request for comparable compliance how such considerations have been addressed.</p>
<p>Art 3(5) RTS 153/2013 Where a CCP maintains a two-tiered board system, the role and responsibilities of the board as established in this Regulation and in Regulation (EU) No 648/2012 shall be allocated to the supervisory board and the management board as appropriate.</p>	<p>Art 3(5) RTS addresses a specific case that might not be relevant for TC CCPs and jurisdictions. Where a TC-CCP maintains a two-tiered board, it would be sufficient that such CCP explains in its request for comparable compliance how role and responsibilities are allocated between the supervisory and the management boards.</p>
<p>Art 4(2) RTS 153/2013 [...] [all relevant] risks shall include the risks it bears from and poses to its clearing members and, to the extent practicable, clients as well as the risks it bears from and poses to other entities such as, but not limited to interoperable CCPs, securities settlement and payment systems, settlement banks, liquidity providers, central securities depositories, trading venues served by the CCP and other critical service providers.</p>	<p>If a TC regulatory requirement generally refers to “interdependences”, this can be considered comparable as long as the TC-CCP describes in its request for comparable compliance all its interdependences and how it address the related risks.</p>
<p>Art 4(3) RTS 153/2013 If a CCP provides services linked to clearing that present a distinct risk profile from its functions and potentially pose significant additional risks to it, the CCP shall manage those additional risks adequately. This may include separating legally the additional services that the CCP provides from its core functions.</p>	<p>The EU approach requiring legal separation of additional services might not be applied in all TC jurisdictions. As long as there are legal requirements ensuring that risks from additional services are ringfenced and the waterfall resources are preserved from</p>

	covering losses from such additional services, such requirements could be considered as comparable to this provision.
<p>Art 4(4) RTS 153/2013</p> <p>The board shall define, determine and document an appropriate level of risk tolerance and risk bearing capacity for the CCP. The board and senior management shall ensure that the CCP's policies, procedures and controls are consistent with the CCP's risk tolerance and risk bearing capacity and that they address how the CCP identifies, reports, monitors and manages risks.</p>	If a TC requirement specifies that the Board has final responsibility for the CCP risk management framework without referring to the concept of "risk tolerance" and "risk bearing capacity", it can still be considered comparable as long as the TC-CCP demonstrate that its risk management framework has defined and determined such concepts in a consistent manner.
<p>Art 5(2) RTS 153/2013</p> <p>[...] If necessary, independent legal opinions shall be sought for the purpose of this analysis. [...]</p>	Since the requirement for legal opinions is "if necessary", it would be sufficient that a TC-CCP explains in its request for comparable compliance why no legal opinion was necessary or how it otherwise conducted the required analysis.
<p>Art 5(3) RTS 153/2013</p> <p>In developing its rules, procedures and contractual arrangements a CCP shall consider relevant regulatory principles and industry standards and market protocols and clearly indicate where such practices have been incorporated into the documentation governing the rights and obligations of the CCP, its clearing members and other relevant third parties.</p>	Art 5(3) RTS prescribes that a CCP shall "consider", it would be sufficient that a TC-CCP explains in its request for comparable compliance how such considerations have been addressed.
<p>Art 5(4) RTS 153/2013</p> <p>[...] If necessary, independent legal opinions shall be sought by the CCP for the purpose of this analysis. [...]</p>	Since the requirement for legal opinions is "if necessary", it would be sufficient that a TC-CCP explains in its request for comparable compliance why no legal opinion was necessary or how it otherwise conducted the required analysis.
<p>Art 6(1) RTS 153/2013</p> <p>[...] When establishing its compliance function, the CCP shall take into account the nature, scale and complexity of its business, and the nature and range of the services and activities undertaken in the course of that business.</p>	Last sentence of Art 6(1) RTS prescribes that a CCP shall "take into account", it would be sufficient that a TC-CCP explains in its request for comparable compliance how such considerations have been addressed.
<p>Art 7(1) RTS 153/2013</p> <p>[...] The board shall establish, at a minimum an audit committee and a remuneration committee. The risk committee established in accordance with Article 28 of EMIR shall be an advisory committee to the board.</p>	If a TC requirement does not prescribe that the Board to establish an audit committee or a remuneration committee, it shall ensure that the Board undertakes directly the tasks, roles and responsibilities assigned to them.
<p>Art 7(4) RTS 153/2013</p>	If a TC requirement does not prescribe that the Board retains the approval of decisions affecting the CCP risk profile, it can be

<p>Where the board delegates tasks to committees or sub- committees, it shall retain the approval of decisions that could have a significant impact on the risk profile of the CCP.</p>	<p>considered comparable as long as it ensures that the Board takes final responsibility and can revoke or amend any such decision at its discretion.</p>
<p>Art 8 RTS 153/2013</p>	<p>TC detailed requirements on the remuneration policy may be accepted as comparable to art 8 RTS 153/2012 as long as they achieve the regulatory objective of Article 26(5) of EMIR.</p>
<p>Art 10 RTS 153/2013</p>	<p>TC detailed requirements on disclosure may be accepted as comparable to art 10 RTS 153/2012 as long as they achieve the regulatory objective of Article 26(7) of EMIR.</p>
<p>Art 27(2) EMIR [...] Representatives of clients of clearing members shall be invited to board meetings for matters relevant to Article 38 and 39.</p>	<p>TC requirements may envisage other measures to ensure that clients are involved in the decision-making on matters relating to Transparency and Segregation and Portability.</p>
<p>Art 28(1) EMIR [...] a risk committee [...] shall be composed of representatives of its Clearing Members, independent members of the board and representatives of its Clients. [...] None of the groups of representatives shall have a majority in the risk committee.</p>	<p>TC requirements may envisage alternative solutions to ensure the involvement of clearing members and clients in the decision-making on any arrangements that may impact the risk management of the CCP.</p>
<p>Art 28(2) EMIR [...] The governance arrangements shall be publicly available [...] Art 28(4) EMIR Without prejudice to the right of competent authorities to be duly informed, the members of the risk committee shall be bound by confidentiality. [...] Art 28(5) EMIR A CCP shall promptly inform the competent authority of any decision in which the board decides not to follow the advice of the risk committee.</p>	<p>Where TC requirements require the CCP to establish a risk committee with representatives of clearing members and clients, they should include comparable requirements to those established in the provisions of Article 28(2), (4) and (5) of EMIR listed in this table.</p>
<p>Art 12(2)-(6) RTS 153/2013 2. Where records or information are less than six months old, they shall be provided to the authorities [...] as soon as possible and at the latest by the end of the following business day following a request from the relevant authority. 3. Where records or information are older than six months, shall be provided to the authorities [...] as soon as possible and within five business days following a request from the relevant authority.</p>	<p>These articles specify strict timelines and a predefined number of days in which the requirement must be fulfilled. TC requirements may fulfil the same regulatory objective with slightly different timelines and deadlines.</p>

4. Where the records processed by the CCP contain personal data CCPs shall have regard to their obligations under Directive 95/46/EC of the European Parliament and of the Council (1) and Regulation (EC) No 45/2001 of the European Parliament and of the Council (2).

5. Where a CCP maintains records outside the Union, it shall ensure that the competent authority, ESMA and the relevant members of the ESCB are able to access the records to the same extent and within the same periods as if they were maintained within the Union.

6. Each CCP shall name the relevant persons who can, within the delay established in paragraphs 2 and 3 for the provision of the relevant records, explain the content of its records to the competent authorities.

Art 31(3)-(8) EMIR 648/2012

3. The competent authority may, during the assessment period, where necessary, but no later than on the 50th working day of the assessment period, request any further information that is necessary to complete the assessment. Such request shall be made in writing and shall specify the additional information needed.

The assessment period shall be interrupted for the period between the date of request for information by the competent authority and the receipt of a response thereto by the proposed acquirer. The interruption shall not exceed 20 working days. Any further requests by the competent authority for completion or clarification of the information shall be at its discretion but may not result in an interruption of the assessment period.

4. The competent authority may extend the interruption referred to in the second subparagraph of paragraph 3 up to 30 working days where the proposed acquirer or vendor is either:

- (a) situated or regulated outside the Union;
- (b) a natural or legal person not subject to supervision under this Regulation or Directive [...].

5. Where the competent authority, upon completion of the assessment, decides to oppose the proposed acquisition, it shall, within two working days, and not exceeding the assessment period, inform the proposed acquirer in writing and provide the reasons for that decision. The competent authority shall notify the college referred to in Article 18 accordingly. Subject to national law, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer.

The provisions of Article 31(3)-(8) are more procedural than regulatory, making references to timelines, deadlines to fulfil administrative tasks, specific formats.

TC requirements can be considered comparable also when prescribing different procedures or timelines, as long as the regulatory objective of the requirement is identical to EMIR, as defined in Articles 31(1) and (2) are satisfied.

<p>However, Member States may allow a competent authority to make such disclosure in the absence of a request by the proposed acquirer.</p> <p>6. Where the competent authority does not oppose the proposed acquisition within the assessment period, it shall be deemed to be approved.</p> <p>7. The competent authority may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.</p> <p>8. Member States shall not impose requirements for notification to, and approval by, the competent authority of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Regulation.</p>	
<p>Art 32(2),(5)-(6) EMIR 648/2012</p> <p>2. The competent authorities may oppose the proposed acquisition only where there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or where the information provided by the proposed acquirer is incomplete.</p> <p>5. Notwithstanding Article 31(2), (3) and (4), where two or more proposals to acquire or increase qualifying holdings in the same CCP have been notified to the competent authority, the latter shall treat the proposed acquirers in a non-discriminatory manner.</p> <p>6. The relevant competent authorities shall cooperate closely with each other when carrying out the assessment where the proposed acquirer is one of the following:</p> <p>(a) another CCP, a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm, market operator, an operator of a securities settlement system, a UCITS management company or an AIFM authorised in another Member State;</p> <p>(b) the parent undertaking of another CCP, a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm, market operator, an operator of a securities settlement system, a UCITS management company or an AIFM authorised in another Member State;</p> <p>(c) a natural or legal person controlling another CCP, a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm, market operator, an operator of a securities settlement system, a UCITS management company or an AIFM authorised in another Member State.</p>	<p>The provisions of Article 32 (2), (5) and (6) describe some procedural aspects of the assessment to be followed by competent authorities.</p> <p>TC requirements can be considered comparable also when prescribing different procedures, provided that they ensure a sound and prudent assessment when an acquisition is proposed.</p>

<b>Conduct of Business</b>	
<p>Art 36(2) EMIR A CCP must have accessible, transparent and fair rules for the prompt handling of complaints.</p>	<p>If a TC requirement does not prescribe a CCP to have rules for handling complaints, it can still be deemed comparable where it requires the CCP to have governance arrangements to consider the views of clearing members and clients.</p>
<p>Art 38(1) EMIR [...] A CCP shall account separately for the costs and revenues of the services provided and shall disclose that information to the competent authority.</p>	<p>At minimum, the competent authority should have the power to request this information and the CCP should be able to provide it.</p>
<p>Art 38(4) EMIR A CCP shall publicly disclose the operational and technical requirements relating to the communication protocols covering content and formats it uses to interact with third parties, including the operational and technical requirements referred to in Article 7.</p>	<p>At minimum, the CCP should provide this information upon request by applicant clearing members or other stakeholders.</p>
<p>Art 38(5) EMIR A CCP shall publicly disclose any breaches by clearing members of the criteria referred to in Article 37(1) and the requirements laid down in paragraph 1 of this Article, except where the competent authority, after consulting ESMA, considers that such disclosure would constitute a threat to financial stability or to market confidence or would seriously jeopardize the financial markets or cause disproportionate damage to the parties involved.</p>	<p>At minimum, the CCP should notify the competent authority of such an event and consider whether to disclose it publicly.</p>
<p>Art 39(3),(6) EMIR 3. A CCP shall offer to keep separate records and accounts enabling each clearing member to distinguish in accounts with the CCP the assets and positions held for the account of a client from those held for the account of other clients ('individual client segregation'). Upon request, the CCP shall offer clearing members the possibility to open more accounts in their own name or for the account of their clients. 6. When a client opts for individual client segregation, any margin in excess of the client's requirement shall also be posted to the CCP and distinguished from the margins of other clients or clearing members and shall not be exposed to losses connected to positions recorded in another account.</p>	<p>On an exceptional basis, where the implementation of individual client segregation accounts (ISAs) as described in Article 39.3 of EMIR is unlawful, a corresponding requirement in the third country could be accepted as comparable only when implementing a client account type whose characteristics are as close as possible, both in business as usual and in default scenario, to the ISA.</p>

<b>Prudential Requirements</b>	
<p>Art 40 EMIR 648/2012 – Exposure management A CCP must measure and assess its liquidity and credit exposures to each Clearing Member and to any CCPs with which it has entered into interoperability arrangements (“Interoperable CCPs”), on a near to real-time basis</p>	<p>The requirement of managing exposures on a “near to real time basis” should be assessed against the measures taken by the CCP to manage the sudden changes in market conditions as well as the changes in positions (i.e. new trades submitted to the CCP between margin call times). The article is not prescriptive on the manner to achieve this, but the outcome must be that the CCP has appropriate policies and mechanisms to manage these two sources of intra-day change in exposures.</p>
<p>Art 28 (1) RTS 153/2013 – Procyclicality 1. A CCP shall ensure that its policy for selecting and revising the confidence interval, the liquidation period and the lookback period deliver forward looking, stable and prudent margin requirements that limit procyclicality to the extent that the soundness and financial security of the CCP is not negatively affected. This shall include avoiding when possible disruptive or big step changes in margin requirements and establishing transparent and predictable procedures for adjusting margin requirements in response to changing market conditions. In doing so, the CCP shall employ at least one of the following options: (i) applying a margin buffer at least equal to 25% of the calculated margins which it allows to be temporarily exhausted in periods where calculated margins requirements are rising significantly; (ii) assigning at least a 25% weight to stressed observations in the look back period calculated in accordance with article 26; and (iii) ensuring that its margin requirements are not lower than those that would be calculated using volatility estimated over a 10 year historical look back period.</p>	<p>The regulatory objective of this provision is that the margin framework is not leading to pro-cyclical effects. However, the Article 28(1) provides 3 possible choices. A TC requirement envisaging other options can be accepted as comparable as long as the CCP demonstrates that the adopted tool is at least as conservative and stable as one of the three options and provides the same anti-procyclicality effect under a relevant pro-cyclicality metric or set of metrics without allowing the margin model to lower the coverage below the confidence interval defined by Art 24 RTS.</p>
<p>Art 43(1) EMIR 648/2012 – Other financial resources [...] Pre-funded financial resources shall include dedicated resources of the CCP, must be freely available to the CCP and shall not be used to meet the capital requirements under Article 16 EMIR.</p>	<p>The reference to EMIR Art 16 may be substituted by the capital requirement of the CCP in the third country as long as they are comparable to those of Art 16.</p>
<p>Art 44(1) EMIR 648/2012 - Liquidity risk controls[...] A CCP shall measure, on a daily basis, its potential liquidity needs. It shall take into account the liquidity risk generated by the default of at least the two clearing members to which it has the largest exposures.</p>	<p>To be comparable with this provision, a corresponding requirement in the third country should prescribe that the CCP assesses the impact of the default of the two clearing members to which it has the largest exposures in all of their capacities,</p>



	including but not limited to their function of clearing members (i.e. also consider other activities such as settlement banks, etc.).
<p>Art 35(1) RTS 153/2013          (1) A CCP shall keep, and indicate separately in its balance sheet, an amount of dedicated own resources for the purpose set out in Article 45(4) of Regulation (EU) No 648/2012.</p>	<p>To be comparable with this provision, a corresponding requirement in the third country should ensure that the own resources are separated and protected in such a way that they are always available for the purpose of the default waterfall.</p>
<p>Art 48 (3), (5)-(7) EMIR 648/2012 – Default procedures</p> <p>3. The competent authority shall promptly communicate that information to ESMA, to the relevant members of the ESCB and to the authority responsible for the supervision of the defaulting clearing member.</p> <p>5. Where assets and positions are recorded in the records and accounts of a CCP as being held for the account of a defaulting clearing member’s clients in accordance with Article 39(2), the CCP shall, at least, contractually commit itself to trigger the procedures for the transfer of the assets and positions held by the defaulting clearing member for the account of its clients to another clearing member designated by all of those clients, on their request and without the consent of the defaulting clearing member. That other clearing member shall be obliged to accept those assets and positions only where it has previously entered into a contractual relationship with the clients by which it has committed itself to do so. If the transfer to that other clearing member has not taken place for any reason within a predefined transfer period specified in its operating rules, the CCP may take all steps permitted by its rules to actively manage its risks in relation to those positions, including liquidating the assets and positions held by the defaulting clearing member for the account of its clients.</p> <p>6. Where assets and positions are recorded in the records and accounts of a CCP as being held for the account of a defaulting clearing member’s client in accordance with Article 39(3), the CCP shall, at least, contractually commit itself to trigger the procedures for the transfer of the assets and positions held by the defaulting clearing member for the account of the client to another clearing member designated by the client, on the client’s request and without the consent of the defaulting clearing member. That other clearing member shall be obliged to accept these assets and positions only where it has previously entered into a</p>	<p>At minimum, the CCP should notify the competent authority of such a default event.</p> <p>Art 48(5-6-7) refer to client accounts and therefore where account structures are different to EU client account structures, the requirement may be translated into the fact that the CCP acts in accordance with the rules of protection of collateral and positions of the client accounts. The CCP shall also implement procedures promoting the porting of clients’ positions and collateral.</p>

<p>contractual relationship with the client by which it has committed itself to do so. If the transfer to that other clearing member has not taken place for any reason within a predefined transfer period specified in its operating rules, the CCP may take all steps permitted by its rules to actively manage its risks in relation to those positions, including liquidating the assets and positions held by the defaulting clearing member for the account of the client.</p> <p>7. Clients' collateral distinguished in accordance with Article 39(2) and (3) shall be used exclusively to cover the positions held for their account. Any balance owed by the CCP after the completion of the clearing member's default management process by the CCP shall be readily returned to those clients when they are known to the CCP or, if they are not, to the clearing member for the account of its clients.</p>	
<p>Art 49(1), (1a-1e) EMIR 648/2012 – Review of models, stress testing and back testing [...] The CCP shall inform its competent authority and ESMA of the results of the tests performed and shall obtain their validation in accordance with paragraphs 1.a, 1b,1c, 1d and 1e before adopting any significant change to the models and parameters. The adopted models and parameters, including any significant change thereto, shall be subject to an opinion of the college in accordance with the following paragraphs. ESMA shall ensure that information on the results of the stress tests is passed on to the ESAs, the ESCB and the Single Resolution Board to enable them to assess the exposure of financial undertakings to the default of CCPs.</p>	<p>The model validation and college opinion are specific to EU CCPs. In order to be considered comparable, a TC requirement should envisage an approval procedure by the competent authority of the risks model and of any significant changes thereto.</p>
<b>Interoperability Arrangements</b>	
<p>Art 51 EMIR</p>	<p>Art 51 EMIR should apply when the TC CCP enters into an interoperability arrangement with an EU CCP authorised under Article 14 of EMIR.</p>
<p>Art 54 EMIR</p>	<p>The approval procedures and college opinion are specific to EU CCPs. In order to be considered comparable, a TC requirement should envisage an approval procedure by the competent authority.</p>

## 4.2 The modalities and conditions

33. Concerning the **modalities** to carry out the assessment, the Delegated Act could specify inter alia that:

- ESMA should base its assessment relying as much as possible on the information to be provided in the reasoned request by the CCP (as further detailed in Section 2.2.3), and any further relevant information provided by the third country authority or publicly available;
- ESMA should carry out its assessment following the 4-step approach presented above, and in particular the “comparability” analysis and the final assessment should take into account the minimum elements and the guidance specified above.

34. Finally, concerning the **conditions** to carry out the assessment, the delegated act could specify the deadlines for requesting and completing the assessment. In terms of timing, the request for comparable compliance can be submitted on three different occasions:

- i. *Within the recognition process:* Once ESMA has determined that an applicant CCP is not a Tier 1 CCP in accordance with Article 25(2a) of EMIR, the CCP can submit a request for comparable compliance as an integration to its application for recognition, in which case the assessment of comparable compliance is part of the recognition process.
- ii. *Any time after recognition as Tier 2 CCP:* The wording of Article 25a of EMIR does not exclude that a recognised Tier 2 CCP that has not requested comparable compliance upon its recognition can submit such a request for comparable compliance any time after its recognition.
- iii. *Upon the review of recognition decision:* Moreover, the wording of Article 25a of EMIR does not exclude that a CCP that is reclassified as Tier 2 in the context of the review of its recognition decision under Article 25(5) of EMIR can then submit such a request for comparable compliance, in which case the assessment of comparable compliance is part of the recognition review.

35. Where the request for comparable compliance is made in the context of an application for recognition (or a review of the recognition decision):

- a. the CCP should apply within a given time period from the determination by ESMA that the CCP does not qualify as a Tier 1 CCP. Upon such a determination, ESMA should request the CCP to supplement its application to provide additional information in order to assess its compliance with the supplementary conditions in Article 25(2b) of EMIR. Then, the CCP should submit its reasoned request for comparable compliance as part of its response to the ESMA’s request for information, within the respective deadline set by ESMA.

- b. Failing to do so, ESMA may reject a late request if this could substantially delay the recognition decision and be detrimental to the interest of the Union. This may be particularly relevant in the case of the review of the decision of a TC CCP which has been reclassified from Tier 1 to Tier 2. ESMA has 180 working days from the submission of a complete application to decide on the recognition of an applicant TC CCP (or on the review of its decision on a recognised TC CCP). The submission of a request for comparable compliance, being part of the application, will imply a new completeness assessment and lead to a new completeness date. If a request for comparable compliance is allegedly submitted towards the end of the recognition process to delay the recognition decision, it may further postpone the submission of that CCP to the Tier 2 regime, which might go against the interest of the Union.
- c. When ESMA has rejected a late request for comparable compliance, the CCP can submit a new request only after a recognition decision has been taken.

36. When the request is made after the recognition of a Tier 2 CCP:

- a. the request can be submitted any time, and ESMA has 180 working days from the submission of a complete reasoned request to complete its assessment and decide whether comparable compliance can apply.
- b. However, when ESMA has already rejected a request by a Tier 2 CCP on the conclusion of its assessment that comparable compliance cannot apply, that CCP can submit a new request only if there have been relevant changes in the requirements that apply to that CCP under the third country regulatory framework (including where relevant, changes to the CCPs' rules and procedures).

**Q6: Do you agree on the modalities and conditions proposed for conducting the assessment for comparable compliance? What other considerations should be included in such modalities and conditions?**

### **4.3 The CCP's request for comparable compliance**

37. Article 25a(1) of EMIR envisages that a Tier 2 CCP may submit a reasoned request for ESMA to assess its comparable compliance with the EMIR requirements. Moreover, Article 25a(2) of EMIR specifies that this request shall provide the factual basis for a finding of comparability and the reasons why compliance with the requirements applicable in the third country satisfies the EMIR requirements.

38. Taking into account the 4-step approach for ESMA's assessment discussed above, the CCP reasoned request should include at the minimum:

- a. The mapping of the requirements (see Template 1 for illustrative purposes) in the third country for which comparable compliance is requested against the EMIR requirements, i.e. each EMIR requirement (each relevant provision in EMIR

Articles, paragraph by paragraph) should be mapped with the corresponding requirement in the third country achieving the same regulatory objective.

- b. Per each mapped requirement, the reason why compliance with that requirement satisfies the corresponding EMIR requirement.

39. The reasoned request would then provide ESMA with the necessary information to undertake the first two steps of assessment for comparable compliance: the mapping (step 1) and the comparative analysis (step 2).
40. When a Tier 2 CCP submits a request for comparable compliance in the context of its first recognition, such request is to be considered part of its application for recognition.
41. ESMA could ask the relevant third country supervisory authority under the respective Memorandum of Understanding (MoU) for the recognition of TC CCPs to review the information submitted in the reasoned request of Tier 2 CCP, for instance when it comes to legal considerations. The current template for the MoU for the recognition of TC CCPs will have to be amended to reflect also this specific need for assistance, besides the other changes assigning ESMA new supervisory powers and tasks vis-à-vis Tier 2 CCPs.
42. In addition, ESMA could require that reasoned requests to be submitted by the Tier 2 CCPs already include an opinion by the third country supervisory authority on the accuracy of the representation of the requirements applying in the third country. Where necessary, a certified translation of the third country requirements and supporting legal opinions could be required.

**Q7: Do you agree that the CCP reasoned request shall include (i) the mapping of the requirements under EMIR for which comparable compliance is requested against the requirements in the third country, whereby each relevant article of EMIR and related RTS (paragraph by paragraph) should be mapped with the corresponding requirement in the third country achieving the same regulatory objective, and (ii) per each mapped requirement, the reason why compliance with a requirement in the third country satisfies the corresponding requirement under EMIR?**

**Q8: Do you agree that ESMA may also request the CCP to include in its reasoned request (i) an opinion of the third country supervisory authority on the accuracy of the representation of the requirements applying in the third country, (ii) where necessary, a certified translation of relevant requirements in the third country, and (iii) a legal opinion confirming the accuracy of the mapping provided?**

**Template 1: Mapping of TC requirements against EMIR requirements**

<b>CCP Requirements</b>	<b>TC Regulatory requirements</b>	<b>TC CCP rules, policies and procedures<sup>8</sup></b>	<b>Reasons for satisfying compliance with EMIR requirements</b>
<b>Capital requirements</b> Art 16 EMIR Art 1-6 RTS 152/2013			
<b>Organisational requirements</b>			
Governance arrangements and Risk controls and internal mechanisms Art 26(1) EMIR Art 3-4 RTS 153/2013			
Compliance policy and procedures and Compliance function Art 26(2) EMIR Art 5-6 RTS 153/2013			
Organisation structure and separation of reporting lines Art 26(3),(4) EMIR Art 7 RTS 153/2013			
Remuneration Policy Art 26(5) EMIR Art 8 RTS 153/2013			
Information technology systems Art 26(6) EMIR Art 9 RTS 153/2013			
Disclosure Art 26(7) EMIR Art 10 RTS 153/2013			
Internal auditing Art 26(8) EMIR Art 11 RTS 153/2013			
Senior management and Board Art 27 EMIR			
Risk Committee Art 28 EMIR			
Record Keeping Art 29 EMIR Art 12-16 RTS 153/2013			
Shareholder assessment Art 30-32 EMIR			
Conflict of Interest Art 33 EMIR			

<sup>8</sup> This column is relevant only for CCPs established in a jurisdiction where requirements laid down in a CCP's internal rules and procedures form an integral part of the legal and supervisory arrangements applicable to that CCP and are, therefore, legally binding requirements the CCP must comply with, as confirmed in the Commission's Equivalence Decision of that jurisdiction.

<b>Business Continuity</b> Art 34 EMIR Art 17-23 RTS 153/2013			
Outsourcing Art 35 EMIR			
<b>Conduct of Business</b>			
General provisions Art 36 EMIR			
Participation requirements Art 37 EMIR			
Transparency Art 38 EMIR			
Segregation and Portability Art 39 EMIR			
<b>Prudential requirements</b>			
Exposure management Art 40 EMIR			
Margin requirements Art 41 EMIR Art 24-28 RTS 153/2013			
Default Fund Art 42 EMIR Art 29-31 RTS 153/2013			
Other financial resources Art 43 EMIR			
Liquidity risk controls Art 44 EMIR Art 32-34 RTS 153/2013			
Default waterfall Art 45 EMIR Art 35-36 RTS 153/2013			
Collateral requirements Art 46 EMIR Art 37-42 RTS 153/2013			
Investment Policy Art 47 EMIR Art 43-46 RTS 153/2013			
Default procedures Art 48 EMIR			
Review of models, stress testing and back testing Art 49 EMIR Art 47-61 RTS 153/2013			
Settlement Art 50 EMIR			
Calculations and reporting for the purposes of R No 575/2013 Art 50a-50d of EMIR			
<b>Interoperability arrangements</b> Art 51-54 EMIR			

## 5 Annexes

### 5.1 Annex I: Cost-Benefit Analysis

The new Article 25a of EMIR provides for Tier 2 CCPs to request ESMA to assess “comparable compliance”, i.e. the extent to which a CCP’s compliance with EMIR requirements, as set out in Article 16 (CCP capital requirements) and in Title IV (CCP requirements, including organisational, conduct of business, and prudential requirements) and Title V (requirements on interoperability arrangements) of EMIR – thereafter referred to altogether as “EMIR requirements”, 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 Commission 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.

The technical advice to the Commission includes the following policy options:

**Policy Option 1** on the minimum elements to be assessed: the technical advice proposes an approach based on a requirement-by-requirement assessment, at the CCP-level and on an outcome basis, distinguishing between

- core provisions of EMIR (as listed in Table 1 above) which are to be satisfied by equal or at least as strict or conservative as provisions of the corresponding requirement applicable in the third country; and
- other provisions (as listed in Table 2 above) which can be satisfied by similar corresponding requirements substantially achieving the respective regulatory objectives in accordance with the guidance specified in Table 2.

Moreover, the technical advice proposes that, where a third country requirement can be on average, but not always, equal or at least as strict or conservative as the core provisions listed in Table 1, it can still be accepted as comparable provided that the Tier 2 CCP adopts the corresponding EMIR requirement as a floor or minimum requirement, through adequate rules, policies and procedures.

**The benefit** of this approach is that, where comparable compliance applies, it is ensured that a Tier 2 CCP, by complying with comparable requirements in their third country, will always comply with the core provisions of EMIR requirements and satisfy the regulatory objective of the other provisions, in order to maintain, in the interest of the Union, a single-level playing field across EU-CCPs and recognised Tier 2 CCPs and a level of resilience of the Tier 2 CCPs in accordance with the EMIR requirements.

**The costs** of this approach for Tier 2 CCPs can be listed as follows:



- **no costs, where comparable compliance applies:** Tier 2 CCPs will continue to comply only with the requirements in their third country (without any further change to their rules or procedures);
- **costs of compliance with dual requirements,** where no comparable compliance can apply: comparable compliance might not always apply for the whole range of EMIR requirements, as (unless a third country regulatory framework has transposed the same requirements under EMIR) it is not obvious that the requirements in third country applying to a Tier 2 CCP could satisfy, on an outcome basis, all EMIR requirements. Therefore, Tier 2 CCPs which will have their request for comparable compliance rejected would have to comply with two set of requirements, those under EMIR and those in their third country. However, as comparable compliance would apply on a requirement-by-requirement, these costs will be limited to the list of EMIR requirements for which comparable compliance could not apply; or
- **adjustment costs to extend the applicability of comparable compliance:** a Tier 2 CCPs may decide to amend its rules and procedures to adopt an EMIR requirement as a minimum or a floor, where the corresponding requirement in the third country is not always equal or at least as strict or conservative as that EMIR requirement, in order to allow comparable compliance with respect to such requirement.

Any further attempt to reduce the costs of compliance with dual requirements by softening the approach (e.g. by adding further flexibility) to assess comparable compliance could be detrimental to the benefit of the proposed approach ensuring, in the interest of the Union, a single level-playing field across EU-CCPs and recognised Tier 2 CCPs and a level of resilience of the Tier 2 CCPs in accordance with the EMIR requirements.

**Policy Option 2** on the modalities and conditions to carry out the assessment: the technical advice proposes a comprehensive, practical process for conducting the assessment for comparable compliance. The latter should be primarily based on the information a Tier 2 CCP's request, address only the requirements for which the CCP has requested comparable compliance, be conducted in line with the process envisaged for the recognition of Tier 2 CCPs.

**The benefit** of this process is that it ensures an efficient and balanced solution, whereby the requesting Tier 2 CCP has to provide in its reasoned request all relevant information for ESMA's assessment and ESMA can independently conduct the assessment in accordance with the guidance provided in the Delegated Act and within a timeline consistent with the recognition process. Moreover, the information details and deadlines added in the procedural aspects of the process supports the requesting Tier 2 CCP in adequately planning and preparing its reasoned request for comparable compliance.

**The costs** of this approach for Tier 2 CCPs can be listed as follows:

- **the costs of preparing a comprehensive reasoned request,** including the mapping analysis and all information necessary for the assessment, as well as upon request by ESMA: the opinion of the third country supervisory authority on the accuracy of the representation of the requirements applying in the third country; and, where necessary,



a certified translation of the third country requirements and supporting legal opinions;  
and

- ***the costs of conducting the assessment by ESMA***, which will be passed onto the requesting Tier 2 CCP in the form of supervisory fee for the assessment and a discount once comparable compliance is granted (see separate consultation paper on fees for TC-CCP under EMIR).

Any attempt to reduce the costs of preparing the reasoned request, by reducing the scope of information to be included in the latter, would conversely increase the costs of conducting the assessment by ESMA, as the latter will have to obtain otherwise any missing information, which would also imply further delaying the assessment. The proposed process instead is considered to be most efficient as it provides adequate incentives to the Tier 2 CCP to provide all necessary information for ESMA's assessment in its reasoned request in the most cost-effective and timely manner.

**Q9: Do you agree on the cost benefit analysis annexed to the draft technical advice?  
Are there other considerations to be reflected in the cost benefit analysis?**

## 5.2 Annex II: Summary of questions

Q1: Do you agree on the overall approach proposed for ESMA's assessment for comparable compliance? What other considerations should be reflected in the assessment for comparable compliance?

Q2: Do you agree that ESMA should accept a requirement in a third country as comparable to a corresponding requirement under EMIR where it is assessed to be, on an outcome basis, equal or at least as strict or conservative as, the corresponding requirement under EMIR?

Q3: Do you agree that the minimum elements to be specified in the Commission's delegated act should include the core provisions listed in Table 1? What other considerations should be included as minimum elements of the assessment?

Q4: Do you agree that, where a third country requirement can be on average, but not always, equal or at least as strict or conservative as the core provisions listed in Table 1, it can still be accepted as comparable provided that the Tier 2 CCP adopts the corresponding EMIR requirement as a floor or minimum requirement, through adequate rules, policies and procedures?

Q5: Do you agree that, when a third country requirement is similar but not always equal or at least as strict or conservative as, the provisions not included in the minimum elements and listed in Table 2, it can still be considered to be comparable where it substantially achieves the respective regulatory objectives in accordance with the guidance specified in Table 2?

Q6: Do you agree on the modalities and conditions proposed for conducting the assessment for comparable compliance? What other considerations should be included in such modalities and conditions?

Q7: Do you agree that the CCP reasoned request shall include (i) the mapping of the requirements under EMIR for which comparable compliance is requested against the requirements in the third country, whereby each relevant article of EMIR and related RTS (paragraph by paragraph) should be mapped with the corresponding requirement in the third country achieving the same regulatory objective, and (ii) per each mapped requirement, the reason why compliance with a requirement in the third country satisfies the corresponding requirement under EMIR?

Q8: Do you agree that ESMA may also request the CCP to include in its reasoned request (i) an opinion of the third country supervisory authority on the accuracy of the representation of the requirements applying in the third country, (ii) where necessary, a certified translation of relevant requirements in the third country, and (iii) a legal opinion confirming the accuracy of the mapping provided?

Q9: Do you agree on the cost benefit analysis annexed to the draft technical advice? Are there other considerations to be reflected in the cost benefit analysis?

### 5.3 Annex III: Commission's provisional request for technical advice

Provisional request to the European Securities and Markets Authority (ESMA) for technical advice on a possible delegated act concerning comparable compliance for systemically important or likely to become systemically important 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>9</sup>) as amended by the 2019 CCP Supervision Regulation<sup>10</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>11</sup> and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").<sup>12</sup>

According to Article 25a(3) of the Regulation as amended, and with regard to the assessment to be carried out by ESMA on whether a systemically important or likely to become systemically important third-country CCP (Tier 2 CCP), in its compliance with the applicable third-country framework, may be deemed to satisfy compliance with specific EMIR requirements, the Commission shall adopt a delegated act to specify further (i) the minimum elements to be assessed and (ii) the modalities and conditions to carry out the assessment.

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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>13</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.

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<sup>9</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>10</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0438+0+DOC+PDF+V0//EN>

<sup>11</sup> Communication of 9.12.2009. COM (2009) 673 final.

<sup>12</sup> OJ L 304, 20.11.2010, p. 47.

<sup>13</sup> Commission's Decision of 6.6.2001 establishing the European Securities Committee, OJ L 191, 17.7.2001, p.45.

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.

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 of third-country CCPs and their supervision under EMIR will be enhanced. The Regulation as amended introduces a two-tier system for third-country CCPs based on their systemic importance. Where a third-country CCP is considered systemically important or likely to become systemically important for the financial stability of the Union or for one or more of its Member States, that third-country CCP will be classified as a Tier 2 third-country CCP by ESMA in accordance with paragraph 2a of Article 25 of the Regulation as amended. A third-country CCP that has not been determined as systemically important or likely to become systemically important for the Union or for one or more of the Member States, is referred to as Tier 1 third-country CCP.

The consequence of ESMA determining a third-country CCP to be a Tier 2 CCP is that such CCP can only be recognised and permitted to provide clearing services or activities in the Union if it meets specific conditions referred to in Article 25(2b). In particular, the first condition under point (a) of Article 25(2b) requires that the CCP complies, at the moment of the recognition and thereafter on an ongoing basis, with the requirements set out in Article 16 and Titles IV and V of the Regulation as amended (**'the EMIR requirements'**). The reason for these specific conditions is to address the concerns that may arise for the financial stability to the Union and one or more of the Member States.

In accordance with Article 25a of the Regulation as amended, a Tier 2 CCP may request ESMA to assess whether that CCP, in its compliance with the applicable third-country framework, taking into account the provisions of the related equivalence decision, may be deemed to satisfy compliance with the specific requirements referred to in Article 25(2b)(a) of the Regulation as



amended. In carrying out this assessment, ESMA shall take into account certain minimum elements and respect certain modalities and conditions to be further specified in a Commission delegated act to ensure that the assessment effectively reflects the regulatory objectives of the EMIR requirements and the Union's interests as a whole.

## 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>14</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 cooperate, where relevant, 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

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<sup>14</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.

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:
  - 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**

In order to ensure that ESMA's assessment of comparable compliance effectively reflects the regulatory objectives of the EMIR requirements and the Union's interests as a whole, Article 25a(3) of the Regulation as amended requires the Commission adopt a delegated act specifying further (i) the minimum elements to be assessed and (ii) the modalities and conditions to carry out the assessment. The Regulation further specifies that a Tier 2 CCP may submit a reasoned request for ESMA's assessment of comparable compliance and that that request shall provide (i) the factual basis for a finding of comparability and (ii) the reasons why compliance with the requirements applicable in the third country satisfies the EMIR requirements.

ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act on how to request and assess comparable compliance, and more specifically on the following aspects:

- ESMA is invited to provide advice on the minimum elements to be assessed for determining comparable compliance for Tier 2 CCPs. ESMA should consider in which way provisions in each EMIR requirement need to be satisfied by compliance with a corresponding requirement in the third country. In addition, ESMA should provide advice on whether technical standards adopted on the basis of those EMIR requirements should be part of the minimum elements to be assessed. Likewise, ESMA should also consider what elements should be part of the applicable third-country framework, including for instance a Tier 2 CCP's internal rules and procedures where these are considered as legally binding.

- ESMA should suggest the modalities to carry out the assessment for comparable compliance and is invited to develop an appropriate methodology to do so. Article 25a(1) of the Regulation as amended provides that the assessment should take into account the provisions of the implementing act adopted in accordance with Article 25(6) ('equivalence decision') corresponding to the third-country framework applicable to the Tier 2 CCP making the request for comparable compliance. In accordance with Recital (41) of the Regulation as amended, ESMA is invited to reflect on how the equivalence decision (e.g. any conditions attached to its application) should be reflected in its assessment of comparable compliance. In addition, ESMA may also indicate how the assessment for comparable compliance will differ from the equivalence assessment, notably in considering the implications of an assessment that is carried out both at entity level (a specific Tier 2 CCP) and at requirement level (a specific EMIR provision).

- Regarding the modalities, ESMA is also invited to reflect on how to ensure that the comparable compliance assessment reflects the regulatory objectives of the EMIR requirements and the Union's interest as a whole, according to Article 25a(3) of the Regulation as amended. Recital (41) of the Regulation also provides that ESMA should be able to take into account the extent to which the compliance of a Tier 2 CCP with the requirements applicable in that third country can be compared to the compliance of that CCP. In light of this, ESMA should provide advice on how to assess comparability where third-country requirements may not be precisely identical to EMIR requirements but achieve similar regulatory objectives or serve the Union's interest



as a whole. ESMA is also invited to provide advice on where comparable compliance cannot be applied and on whether comparable compliance could be applied only partially.

- On the modalities, ESMA is also invited to reflect on how to ensure proportionality when carrying out its assessment by considering the extent to which the financial instruments cleared by a Tier 2 CCP are denominated in Union currencies, in accordance with Recital (41) of the Regulation as amended.

- ESMA is invited to reflect on the conditions to carry out the assessment and indicate the process and timing for third-country CCPs to request comparable compliance in the context of an application for recognition or a review of recognition and for ESMA to complete the assessment. In both cases, ESMA is invited to develop a process to clarify the sequencing of the assessment of comparable compliance with that of the classification of the third-country CCP as a Tier 2 CCP. In this regard, ESMA is invited to consider point (a) of Article 25(2b) of the Regulation as amended, which refers to comparable compliance in the context of the recognition process, and the last subparagraph of paragraph 2a of Article 25 of the Regulation, which provides that an applicant third-country CCP will be informed if it is a Tier 1. ESMA is also invited to consider Article 25(5) on the review of recognition decisions. ESMA should also specify the conditions under which a request by a third-country CCP may be rejected.

-Regarding the conditions to carry out the assessment, as the reasoned request from the CCP is the basis for triggering the assessment according to Article 25a(1) of the Regulation as amended, ESMA should also indicate what information a third-country CCP should provide in its reasoned request to ESMA. According to Article 25a(2), the request must provide the factual basis for a finding of comparability and the reasons why compliance with the requirements applicable in the third country satisfies the EMIR requirements. ESMA should advise on whether relevant third-country authorities should play any role in verifying the information provided by a third-country CCP.

#### **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.

The Regulation as amended requires the Commission to adopt the delegated act within twelve months from its entry into force. In order for the Regulation to be fully operational and for ESMA to be able to perform its new tasks with regard to third-country CCPs, including the option for a third-country CCP to request comparable compliance where it may be classified as a Tier 2 CCP, it is of the outmost importance to start working on this issue as soon as possible.

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

## 5.4 Annex IV: Draft technical advice on Comparable Compliance

This annex presents an exemplification of how the draft technical advice on comparable compliance could be transposed in the Commission's Delegated Act.

### **Article 1 - Assessment of comparable compliance**

1. For the purposes of the assessment referred to in Article 25a(1) of Regulation (EU) No 648/2012, ESMA shall take into account the following:
  - a. the information provided by a CCP in its reasoned request for comparable compliance, as further specified in Article 2 of this Regulation;
  - b. the minimum elements specified in Article 3 of this Regulation;
  - c. the guidance specified in Article 4 of this Regulation.
2. ESMA shall base its assessment only on the requirements under Regulation (EU) No 648/2012 for which the CCP has requested comparable compliance. It shall consider each requirement under Regulation (EU) No 648/2012 individually against the corresponding requirement in the third country, as indicated in the CCP's request.
3. Requirements under Regulation (EU) No 648/2012 refer to those requirements set out in Article 16 and Title IV and VI of that Regulation, as further specified in the respective regulatory technical standards in Delegated Regulation (EU) No 152/2013 and Delegated Regulation (EU) No 153/2013.
4. Requirements applicable in the third country refer to those legally binding requirements applying to the requesting CCP in the respective third country regulatory framework as identified by the implementing act adopted by the Commission, in accordance with Article 25(6) of Regulation (EU) No 648/2012, for the third country jurisdiction under which the requesting CCP is authorised and supervised.
5. Where the implementing act adopted by the Commission, in accordance with Article 25(6) of Regulation (EU) No 648/2012, has established that in that specific jurisdiction the requesting CCP's internal rules and procedures form an integral part of the legal and supervisory arrangements which the requesting CCP must comply with, ESMA shall also consider the requirements laid down in such internal rules and procedures as second tier legally binding requirements for the purpose of its assessment under Article 25a(1) of Regulation (EU) No 648/2012, as further specified in this Regulation.
6. ESMA shall consider a requirement applicable in a third country as comparable to a corresponding requirement under Regulation (EU) No 648/2012 only where it is assessed to be, on an outcome basis, either:
  - a. equal or at least as strict or conservative as, the corresponding requirement under Regulation (EU) No 648/2012, or

- b. at least similar to the corresponding requirement under Regulation (EU) No 648/2012, in accordance with the in Articles 3 and 4 of this Regulation.
7. When conducting the assessment in accordance with paragraph 6, ESMA shall take into account the reasons provided in the CCP's request why the compliance with the comparable requirements satisfies compliance with the corresponding requirements under Regulation (EU) No 648/2012.
  8. ESMA shall perform the assessment referred to in Article 25a(1) of Regulation (EU) No 648/2012 within 180 working days from the receipt of a complete reasoned request in accordance with Article 2(2) of this Regulation.
  9. For the purpose of fulfilling the condition under Article 25(2b)(a) of Regulation (EU) No 648/2012, where ESMA has assessed a requirement in a third country as comparable to a corresponding requirement under Regulation (EU) No 648/2012, compliance with the requirement under Regulation (EU) No 648/2012 is satisfied by complying with such comparable requirement in the third country.
  10. Where no requirement is accepted as comparable to a specific requirement under Regulation (EU) No 648/2012, ESMA shall assess whether the requesting CCP directly complies with that specific requirement.
  11. Notwithstanding paragraph 10, when specific conditions have been introduced in the implementing act in accordance with Article 25(6) of Regulation (EU) No 648/2012 to address differences with specific requirements under Regulation (EU) No 648/2012, ESMA shall ensure that the CCP complies with those conditions.

#### **Article 2 - CCP's reasoned request**

1. A CCP referred to in Article 25(2b)(a) of Regulation (EU) No 648/2012 may submit a reasoned request referred to in Article 25a(1) of that Regulation in the following circumstances:
  - i. upon ESMA's determination that an applicant CCP is not a Tier 1 CCP in accordance with Article 25(2a) of Regulation (EU) No 648/20102, as an integration to its application for recognition;
  - ii. at any time after its recognition by ESMA as Tier 2 CCP; or
  - iii. once recognised by ESMA, upon the review of its recognition.
2. In the circumstances referred to in point (i) and (iii) of paragraph 1, a CCP shall submit its reasoned request referred to in Article 25a(1) of Regulation (EU) No 648/20102 within the deadline set by ESMA for that CCP to provide additional information for assessing its compliance with the conditions in Article 25(2b) of that Regulation.

ESMA may reject the request submitted after the deadline imposed pursuant to paragraph 2 if this could substantially delay the recognition decision and be detrimental to the interest of the Union. When ESMA has rejected the request, the CCP can submit a new request only after a recognition decision has been taken in accordance with Article 25(2b) of Regulation (EU) No 648/20102.

3. When ESMA has already rejected a request by a Tier 2 CCP on the conclusion of its assessment that comparable compliance cannot apply, that CCP can submit a new request only if there have been relevant regulatory changes in the third country regulatory framework.
4. In accordance with Article 25(4) of Regulation (EU) No 648/20102, within 30 working days of receipt, ESMA shall assess whether the reasoned request is complete. If the request is not complete, ESMA shall set a deadline by which the requesting CCP has to provide additional information.
5. In accordance with Article 25a(2) of Regulation (EU) No 648/20102, the reasoned request shall include:
  - a. the mapping of the requirements under Regulation (EU) No 648/20102 for which comparable compliance is requested against the requirements in the third country, whereby each relevant article of Regulation (EU) No 648/20102 and related articles in the Delegated Regulations (EU) No 152/2013 and No 153/2013, paragraph by paragraph, should be mapped with the corresponding requirement in the third country achieving the same regulatory objective.
  - b. per each mapped requirement, the reason why compliance with a requirement in the third country satisfies the corresponding requirement under Regulation (EU) No 648/20102.
6. The CCP can request comparable compliance with respect to all requirements under Regulation (EU) No 648/20102 or a subset thereof.
7. ESMA may also request that the reasoned request include:
  - (i) an opinion by the third country supervisory authority on the accuracy of the representation of the requirements applying in the third country,
  - (ii) where necessary, a certified translation of relevant requirements in the third country, and
  - (iii) a legal opinion confirming the accuracy of the mapping provided.
8. While reviewing the information submitted in the reasoned request of Tier 2 CCP, ESMA may ask assistance from the relevant third country supervisory authority.

### **Article 3 - Minimum elements to be assessed**

1. The provisions of Regulation (EU) No 648/20102 and related Delegated Regulations (EU) No 152/2013 and No 153/2013 listed in Annex I to this Regulation constitute the minimum elements to be assessed by ESMA for the purpose of Article 25a(1) of Regulation (EU) No 648/20102.
2. Requirements in the third country corresponding to the provisions listed under the minimum elements specified in Annex I can be considered as comparable only when, in accordance with Article 1(6)(a) of this Regulation, these are assessed to be, on an outcome basis, equal or at least as strict or conservative as, the corresponding requirement under Regulation (EU) No 648/2012.
3. In accordance with Article 1(6)(b) of this Regulation, when a third country requirement is similar but not equal or at least as strict or conservative as the core provisions, it can still be considered to be comparable where the CCP adopted the corresponding EMIR requirement as a floor or minimum, through adequate rules, policies and procedures. The CCP shall notify any significant change to these rules, policies and procedures to ESMA, who can decide to review its assessment on the comparability of the respective requirement as appropriate in accordance with Article 1.

### **Article 4 – Guidance for assessing provisions not included in the minimum elements**

1. When assessing the comparability of other provisions of Regulation (EU) No 648/20102 and related Delegated Regulations (EU) No 152/2013 and No 153/2013 not included in Annex I, ESMA shall take into account the guidance as further specified in Annex II to this Regulation.
2. Requirements in the third country corresponding to the provisions listed in Annex II can be considered as comparable only when, in accordance with Article 1(6)(a) of this Regulation, these requirements are assessed to be, on an outcome basis, equal or at least as strict or conservative as, the corresponding requirement under Regulation (EU) No 648/2012.
3. In accordance with Article 1(6)(b) of this Regulation, when a third country requirement is similar but not equal or at least as strict or conservative as the provisions listed in Annex II, it can still be considered to be comparable where it achieves the respective regulatory objectives in accordance with the guidance specified in Annex II.

Annex I: Core provisions as minimum elements to be assessed for comparable compliance (See Table 1).

Annex II: Regulatory objectives of, and guidance on, other provisions not included in the minimum elements (See table 2).