

FINAL



Responses to ESMA Consultation Paper on: (i) Draft technical advice on criteria for tiering under Article 25(2a) of EMIR 2.2; and (ii) Technical Advice on Comparable Compliance under article 25a EMIR

1. Introductory remarks

FIA, ISDA and AFME (together the “Associations”) welcome the opportunity to provide feedback on the following ESMA consultations:

- draft technical advice on criteria for tiering under Article 25(2a) of EMIR 2.2; and
- Technical Advice on Comparable Compliance under article 25a EMIR.

As set out in our feedback on the European Commission EMIR Review Proposal Part 2 (authorisation and recognition of CCPs),¹ the Associations support the overall goal of ensuring that third-country clearing houses (TC-CCPs) offering clearing services to European Union (EU) market participants are appropriately regulated and supervised.

As set out in the previous communication to Vice-President Dombrovskis and DG FISMA, we acknowledge the desire of the European Commission to improve the current supervisory arrangements relating to systemically important TC-CCPs. The EU has been a global leader in developing equivalence regimes for third countries and one of the great strengths of today’s EMIR equivalence regime is that it contains a mechanism to avoid duplicative and conflicting rules on clearing, reporting and risk mitigation requirements.

FIA, ISDA and AFME members look forward to engaging throughout this evaluation process and remain at your disposal to discuss any elements of our response or to provide additional input as need be.

¹ https://fia.org/sites/default/files/2017-09-07_EC_third_country_CCP_proposals.pdf;
<https://www.isda.org/a/EVKDE/ISDA-Response-EMIR-2-Final.pdf>

2. Response to consultation on the draft technical advice on criteria for tiering under Article 25(2a) of EMIR 2.2

In summary, we do have some concerns with respect to the proposed indicators as currently drafted.

Legal Uncertainty and Legitimate Expectations (applicable to Questions 1-6)

The indicators, and the factors that ESMA may consider when assessing each relevant indicator, are currently very broad and do not appear to be specific to assessing the systemic importance of the TC-CCP for the EU, i.e. to assess the potential threat that the TC-CCP in question may represent for the stable and orderly functioning of EU financial markets. There is, in our view, a lack of (i) examples providing clarity on the criteria, and (ii) means for a TC-CCP to assess the likelihood of being deemed a Tier 2 CCP, conferring an unreasonable degree of discretion on ESMA and making its determination on the tiering of CCPs highly unpredictable. Furthermore, ESMA's use of "at least" and "may" when referring to the proposed indicators, suggests that the list of indicators and the related sub-indicators included in the draft technical advice is in fact non-exhaustive; however, there is no indication as to what other indicators could be considered by ESMA. We are of the view that the indicators are so broad as to effectively preclude legal certainty and therefore the legitimate expectations of the TC-CCP would in our view benefit from:

- (a) amendments to provide more detail as to what ESMA will take into account as part of its assessment of each factor (with examples of how each indicator would affect the assessment) to ensure a fair and consistent application of the criteria for tiering under Article 25(2a) of EMIR; and
- (b) restructuring of the indicators to grant priority to those which ESMA considers to be instrumental to its assessment, and to indicate where and how other criteria may support such assessment without being decisive. This would assist with clarifying which TC-CCP's business may have a systemic impact on the Union or one or more of its Member States and are therefore intended to fall within Tier 2.

In addition, given that (i) many TC-CCPs will inevitably be categorised as Tier 1 TC-CCPs given their size and the jurisdictions in which they operate; (ii) such TC-CCPs are likely to have already been subject to a recognition process under EMIR; and (iii) the jurisdictions in which the TC-CCP operates will have already been subject to an equivalence assessment under EMIR, we suggest that ESMA consider introducing a stepped system under which:

- (a) all TC-CCPs are required to provide a limited sub-set of information in the first instance; and
- (b) if, on the basis of the initial information provided, ESMA determines that there is a reasonable probability that the TC-CCP may be a Tier 2 CCP, to require that entity to provide the full set of information.

Our concern is that if all TC-CCPs, regardless of size and importance of their activity in connection with the EU, are required to provide all of the information proposed in the consultation at the outset, they may be disincentivised from applying for recognition on the basis that it would be too onerous for them to do so given the volume and granularity of

information required to be provided, both in terms of cost and resources. If such TC-CCPs were disincentivised from applying for recognition, EU clearing members and market participants may be prevented from accessing certain markets, which would likely have a significant impact on their activities.

By adopting a proportionate approach, e.g. by imposing a de minimis exemption for smaller TC-CCPs such that they are required to only provide a limited sub-set of information, TC-CCPs are less likely to be disincentivised from applying for recognition and therefore access for EU clearing members and market participants should be preserved.

Please see the questions below for specific examples of legal uncertainty we believe to be inherent in the current drafting of the proposed indicators.

Nexus to the EU

ESMA should ensure that all of the indicators that it has proposed are in line with EMIR 2.2 and are included in order to establish a TC-CCP's systemic importance to the stability of the EU or one of its Member States. We are of the view that this determination requires a TC-CCP's nexus to the EU or one of its Member States to be established based on its clearing activities. While we understand that it was the intent of ESMA to make sure that establishing a nexus to the EU or one of its Member States was the objective of each of the proposed indicators, we believe the broad nature of some of the indicators, and underlying considerations, does not make this clear. Consequently, we respectfully request that the indicators, and related considerations, be clarified to clearly establish a direct nexus to the EU or one of its Member States. Our commentary with respect to each of the indicators has been drafted under the assumption that establishing such a nexus of a TC-CCP was ESMA's intended objective.

Proportionality

Under Article 5(4) of the Treaty on the European Union, all delegated acts of the European Commission are subject to the general principle of proportionality. ESMA is explicitly subjected to that principle in the Commission's mandate to ESMA: "*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*" (Annex I, p. 21, technical advice).

According to recital 59, EMIR 2.2, the objective of the legislation is to "*increase the safety and efficiency of CCPs by laying down uniform requirements for their activities*". ESMA's proposals are disproportionate to that objective as they confer upon ESMA excessive discretion, far beyond what is necessary for the safety and efficiency of CCPs (see section above). Further, and as discussed below in the context of Indicator 9, ESMA is proposing to subject TC-CCPs to legislation not currently applicable to domestic CCPs, something which is clearly disproportionate.

Scope of Information-Gathering Powers

ESMA is proposing to grant itself very wide information-gathering powers. To put this into perspective, while domestic (i.e. EU-incorporated) CCPs are subject to a requirement to provide

the information necessary to demonstrate their compliance with EMIR requirements (Article 17(2) of EMIR), TC-CCPs are subject to, *inter alia*, a very wide, disproportionate and prescriptive list of information they must provide to ESMA.

The markets that CCPs serve are by their nature global and therefore CCPs operate across borders and geographies. It is therefore our view that it would be helpful if ESMA were to liaise with third country regulators in order to facilitate the development of a consistent global approach to assess the systemic importance of CCPs and which might also assist regulators' financial stability responsibilities. Doing so would ensure that assessment standards are comparable as between jurisdictions and would minimise the risk of divergence between the various regimes in addressing CCP-related systemic risk concerns

See also commentary on Indicator 9 for further examples of where TC-CCPs are subject to more onerous conditions than domestic CCPs.

Confidentiality

The information required to be provided by TC-CCPs to ESMA is extensive and is likely to include commercial and other sensitive information. ESMA should be clear in its technical advice that it will hold all information received in the strictest of confidence.

Q1 Do you generally agree with the proposed indicators (Indicators 1, 2, 3, 4 and 5) to further assess the nature, size and complexity of the CCP's business? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

As noted above, we are of the view that the indicators should be amended to be more specific and to provide more detailed guidance as to how the numerical information to be provided by TC-CCPs will be taken into consideration by ESMA. Such guidance should take the most relevant and helpful form which could include illustrative examples based on quantitative thresholds (for example, in the context of indicators 3, 10 and possibly also 6) so that TC-CCPs may get a sense of their likely classification as Tier 1 or Tier 2 CCPs when seeking recognition under EMIR. While we think that it is important for ESMA to consider the most appropriate form of guidance, we wish to stress that in our view no single factor should be determinative and must be considered in the context of the other factors as part of a holistic approach. As currently drafted, the indicators are phrased broadly, and provide insufficient insight into how ESMA will assess the nature, size and complexity of the relevant TC-CCP's business for the Union. They are also not currently structured in a way that permits ESMA flexibility to ascribe a greater importance to some of the more critical factors, and to grant less weight to those which it does not consider of high importance. As such, it would be helpful if the indicators were grouped in such a way as to identify the indicators that ESMA will ascribe the greatest importance to, as well as the indicators to which ESMA will attribute less weight.

The lack of specificity and structure in respect of the factors that ESMA may take into account as part of its assessment of the indicators has the potential to create significant uncertainty and a high level of unpredictability. Without further detail and an indication as to the importance that ESMA will attribute to each indicator, it will remain unclear to TC-CCPs how ESMA will assess their business. For example, it would be helpful for ESMA to provide examples of CCP

structures within the EU to illustrate those structures which give rise to an increased level of risk, such that the TC-CCP could be deemed to be critically important to the EU market. Objective indicators could be included to support this, for example by (i) including ratios of EU share on the products offered for clearing in order for ESMA to establish how critical the TC-CCP is for the EU market; and/or (ii) by considering, with reference to a specific product, not only the volume cleared by a specific TC-CCP in EUR but also in other key currencies other than EUR.

As noted in the summary under header 2 above, we suggest that a distinction be made between (i) the criteria that ESMA will take into account in order to undertake a broad screening of the TC-CCP and the information that it will need in order to do this; and (ii) criteria that will directly impact and determine ESMA's risk assessment i.e. the systemic relevance of the TC CCP for the Union. In respect of (ii), we are of the view that Indicators 2, 3, 6, 7, 9 and 10 are relevant.

More structured and specific sub-indicators would be preferable, rather than a list of the factors that ESMA may, in its discretion, consider. We agree with ESMA's approach of not including hard thresholds for all TC-CCPs, as this would be challenging to develop and may give rise to a risk of TC-CCPs falling within or outside of Tier 2 based on a single indicator. However, without any thresholds, the tiering process may become cost and time intensive process, particularly for those entities which are not systemic for the EU market. As such, more detailed factors, including practical examples, would assist with clarifying the scope of ESMA's assessment.

By way of example, the factors that ESMA may take into account as part of its assessment of Indicator 1 include "*the countries where the CCP provides or intends to provide clearing or other relevant services*". However, no guidance is provided in relation to the countries that would cause ESMA concern, and no link back to the EU is specified. For example, it would be helpful to understand whether this factor means that ESMA is primarily concerned with services provided in countries that have been included on an official sanctions list, or if ESMA will consider other factors in addition to this. Further detail in this regard would assist TC-CCPs to understand how ESMA will view the risk profile of their business.

The factors concerning the ownership structure of the TC-CCP are, in our view, particularly unclear. As presented, it is not clear how the information will assist ESMA with making a determination of systemic risk. We suggest that a more relevant way to look at this indicator is to look at whether the TC-CCP is a standalone entity, fully resourced to cope with any extreme but plausible market conditions (as imposed under the EMIR framework), rather than the composition of its shareholders or Group structure.

In respect of Indicator 2, there is no distinction between the different types of derivatives cleared by the TC-CCP. In our view, due to the differences in standardisation and liquidity (among others), this indicator should distinguish between exchange traded derivatives and over-the-counter derivatives and should put particular emphasis on EU market focused products e.g. products that are designed to appeal directly to European market participants and/or contain a significant exposure to European legal entities. In addition, Indicator 2 includes as information to be considered "*the annualised price volatility and the average maturity for each financial instrument*" without specifying the level at which ESMA will attribute any consequences to these data for its determination.

In respect of Indicator 3, non-binding examples should be specified by ESMA in order to provide guidance to TC-CCPs as to when values and volume of transactions cleared might lead ESMA to conclude that the TC-CCP could have a systemic impact on the EU. Practical examples may refer to the number of EU clearing members, clients or transaction volumes, however these examples should be indicative only and should not bind ESMA to reach a determination of systemic importance enabling it to retain flexibility depending on the TC-CCP in question. Furthermore, we believe that using notional to assess volumes of OTC derivatives is not a clear indication of risk and in some cases can lead to an over-estimation of the underlying risk managed by the TC-CCP. As such, we believe that a risk-based measure, for instance initial margin, default fund contribution or a combination of these two measures would be more appropriate. ESMA expressed the possibility of expanding the wording of the indicator to "*provide clearing services or activities*". We suggest ESMA reconsider such language as TC-CCPs are only aware of their clearing members and not necessarily the identity of their clients or indirect clients.

We agree with ESMA's indication in the fourth bullet point that certain of the information included in Indicator 3 may not be available. Where a TC-CCP has a significant number of EU entities that act in a clearing member capacity (including a local branch or subsidiary of an EU parent entity that is acting as a clearing member) and where those EU clearing members offer any form of clearing services to EU clients and EU indirect clients, this should be taken under consideration for the tiering criteria. In addition, as recognised by ESMA in the consultation paper, providing information in respect of indirect clients would be very challenging, given that both direct clearing members and CCPs do not typically have access to this information. On this basis, we suggest that ESMA remove all references to indirect clients from both Indicator 3 and elsewhere in the consultation paper.

Furthermore, while we appreciate that rightly no one indicator can solely trigger a decision on systemic importance, we believe that a combination of Indicator 3, Indicator 6 and Indicator 10 are highly relevant. We note that these indicators could be considered by ESMA along with other indicators in a similar way to other jurisdiction's proposals on systemic relevance of CCPs.² All jurisdictions would, of course, reserve discretion, which in the EU framework would be informed by the other more qualitative indicators developed by ESMA. A common global definition of the key drivers for systemic importance identification would support the supervisory and regulatory cooperation ambition of the OTC Derivatives Regulators Group (ODRG).

As a starting point, in its assessment of Indicators 3, 4 and 5, we suggest that ESMA use the IOSCO Public Quantitative Disclosure Standards for Central Counterparties. This would enable ESMA to align reference and reporting dates with the existing quarterly reporting requirements for the public quantitative disclosures for both sets of data and, to the extent that

² For example, from Chairman Giancarlo's speech at the Futures Industry Association 12th Annual International Derivatives Expo: "The proposed definition of substantial risk to the U.S. financial system consists of two 20 percent tests. The first focuses on the percentage of initial margin from a "U.S. origin" (i.e., initial margin posted by clearing members ultimately owned by U.S.-domiciled holding companies, regardless of the domicile of the clearing member) at a specific non-U.S. DCO. The second focuses on the "U.S. origin" business of the non-U.S. DCO as a percentage of the overall U.S. cleared swaps market. Where both of these "20/20" thresholds are close to 20 percent, the Commission would be able to exercise discretion in determining whether the DCO poses substantial risk to the U.S. financial system." (<https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo75>).

there is a gap between the information provided in the disclosures and the information required by ESMA, ESMA should request that the TC-CCP provide the additional information separately.

In respect of Indicator 4, the reference to “the nature, depth and liquidity of the market” and the publication of certain pre-trade and post-trade information appears to be directed specifically at multi-market TC-CCPs. We note that it will be difficult to compare such TC-CCPs, and to quantify the nature, depth and liquidity of the relevant markets in which the TC-CCP operates.

In respect of Indicator 5, there is no indication given as to what activities would suggest an increase in systemic risk, and as such there is a lack of clarity as to the activities that ESMA will consider relevant. A clear definition of “systemic risk” is required, along with an example of the optimum standard that ESMA expects the TC-CCP to achieve, in order to remedy the lack of clarity in this regard. In addition, in some cases, the link between the sub-indicators and systemic importance is not clear, and there may be scope for rationalisation. We are also of the view that the factors specified in the sub-indicators may be better focused on risks associated with margin levels, rather than on the risks currently specified in this indicator. In particular, the levels of the (i) funded default fund; (ii) unfunded default fund; and (iii) initial margin are likely to give ESMA the clearest picture as to the risk profile of the TC-CCP. We also suggest that the outcome of ESMA’s review should depend on the level of risk attributed to each individual product cleared by the TC-CCP, and the complexity of the default management process. We would encourage ESMA to also clarify what aspects of a TC-CCP’s default management procedures will be of the most interest to it, for example if its focus will be on the close-out process, illiquid exchange-traded derivatives, strategies for sufficient auction participation, transparency and disclosure of default rules and procedures and/or periodic testing and review of default procedures.

Paragraph 20 (Indicator 5) states that ESMA ‘may consider international guidelines and principles’. We are supportive of this approach, but are concerned that the use of the term ‘may’ has the potential to give rise to legal uncertainty. As such, we suggest that ESMA provides an indication of the international guidelines that it may take into account and the criteria that it will consider when making a decision as to whether to consider internal guidelines or principles. We would encourage ESMA to take into account, for example, the CPMI-IOSCO Principles for Financial Market Infrastructures (PFMIs). We further suggest that ESMA considers the positive impact CCPs have had concerning the elimination of bilateral counterparty risk and management of systemic risk. We support the re-use of standard disclosures and self-assessments made under CPMI-IOSCO disclosure requirements.

Under the current proposals, ESMA would receive more information and be able to consider a much broader range of factors in respect of TC-CCPs than it is able to obtain with regards to EU CCPs, and in some cases TC-CCPs may not have access to, or be permitted to provide, the information for commercial, legal or other reasons. For example, ESMA would be able to consider all risks relating to the TC-CCP, including risks relating to collateral held by the CCP. In our view, ESMA’s assessment process would be simplified, and the likelihood of the TC-CCP being able to provide all relevant information would be increased, if ESMA’s information request list was narrowed in scope such that it would only use select, specified information to carry out its assessment of systemic risk. ESMA’s wide ranging discretion also makes the outcome of their assessment unpredictable and therefore difficult for TC-CCPs to assess in advance of applying.

Q2 How would you envisage ESMA to consider risks and in particular cyber-risks in relation to the evaluation of systemic importance?

We believe that cyber risk is not in itself a relevant indicator as to the systemic importance of a CCP. That said, we of course understand that the consideration of cyber risks is valid in relation to TC-CCPs that are in fact systemically important. However, the operation of TC-CCPs does not, in our view, in itself introduce new cyber risks in the EU market (and this is not a risk which would appear to be unique to TC-CCPs), provided that the TC-CCP has appropriate policies and procedures in place to mitigate such risks. In our view, ESMA should reach a determination of systemic importance before assessing the cyber risk of any particular TC-CCP.

ESMA should assess the extent to which any CCP (and therefore including a TC-CCP) is able to protect itself from cyber risks and prevent the propagation of such risks through its users and service providers. This could include a review of the TC-CCP's cyber policies, which may include summaries of the TC-CCP's internal IT setup and any testing procedures that the institution has in place to mitigate the risk of cyber-attacks, along with a description of any significant outsourcing of technical services (and the controls that the TC-CCP has put in place to mitigate any risks arising from such outsourcing). A summary of the applicable local regulation in the jurisdiction of the TC-CCP in respect of cyber risk could also be provided, if available. In our view, this should be sufficient for ESMA to reach a determination as to the level of cyber risk that may be introduced by a particular TC-CCP.

Q3 Do you generally agree with the proposed indicators as specified above (Indicators 6, 7, 8 and 9) to further assess the effect of a failure or disruption of the CCP? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

The proposed indicators should be clarified to make clear exactly what ESMA will take into account as part of its assessment of the relevant factors. The proposed indicators appear to be concerned with both (i) the effect which a failure or disruption would have on the EU financial sector; and (ii) factors such as margin levels and the likelihood of failure or disruption. Given the different focus, the indicators in this section would benefit from clarification. Further to that we suggest that any quantitative indicators be contextualised and assessed not as absolute values but on a relative basis in order to determine whether they indicate that the TC-CCP is in fact of systemic relevance to the EU.

In respect of (i), it is not clear whether ESMA wishes to capture a market-wide disruption, where trading ceases entirely in a particular market if the CCP were to fail, or (ii) if it wishes to capture market disruption which has a subsequent impact on EU markets and therefore has the potential to cause the failure of EU entities. In our view, (ii) is the more logical approach, as we understand that ESMA will need to assess events of default at a macro-level. However, the purpose of this assessment should be limited to a review to determine what the impact would be on EU clearing members and clients, for example if any significant EU institutions would be put at risk of failure in the event that the TC-CCP failed or was subject to disruption.

Indicator 9 sets out ESMA's expectations regarding the recovery and resolution framework to which the TC-CCP is subject. We note that the global work on recovery and resolution planning is ongoing, and not all jurisdictions, including the EU, have a finalized framework in place. ESMA should therefore take a proportionate approach to assessment of this indicator.

It is not currently clear in the indicator what tools ESMA will expect regulators in the home jurisdiction of the TC-CCP to have in the context of the recovery and resolution framework. We note that frameworks for recovery and resolution differ significantly across jurisdictions. Therefore, it is critical that ESMA take an outcomes-based approach to assessment of this indicator, rather than focusing on individual tools or powers at a granular level.

In addition to our comments above, less emphasis should be placed on absolute levels of margin or financial resources, and greater emphasis should be placed on whether the models themselves are appropriate. In many cases, ESMA can take comfort from the equivalence assessments that it and/or the Commission has conducted under EMIR, which should indicate to it that the home country regulation and supervision of the TC-CCP is sufficiently stringent. In particular, ESMA may wish to consider factors such as initial margin, value of payments and settlement values in the context of the size of the EU economy, and to also compare this data against other measures in order to ensure that any determination is proportionate.

In respect of Indicator 6 specifically, we suggest that ESMA consider adding the methods and different model of margin calculations used by TC-CCPs, and default fund size to the list of sub-indicators.

In respect of Indicator 8, it is not clear how certain of the sub-indicators relate to or would be an indication of systemic risk, for example the requirement for TC-CCPs to disclose the extent to which it applies technologies, such as distributed ledger technology, in its settlement and payment process.

Q4 Do you generally agree with the proposed indicators as specified above (Indicators 10 and 11) to further assess the CCP's clearing membership structure? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

The meaning of "EU Client" in this context is not clear. Global providers of clearing services, many of which have complex corporate structures, often use different legal entities across different jurisdictions in order to connect to CCPs. However, regarding EU clearing members' membership of a TC-CCP, any TC-CCP that has a significant number of EU entities that are clearing members (including a local branch or subsidiary of an EU parent entity that is acting as a clearing member) and where those CMs offer any form of clearing services to EU clients and EU indirect clients, should be taken into consideration for the tiering criteria.

Indicator 10 suggests that '*ESMA may consider...the identities and memberships of the CMs of the CCP.*' Further detail should be included in respect of what information is required to be provided on the clearing member, for example whether information showing every jurisdiction in which the particular clearing member operates, or whether a more restricted interpretation was intended.

In addition, we would be grateful for clarification on the intention behind the proposed indicator, as it may be that TC-CCPs do not have access to the information that ESMA intends to capture. For example, if the purpose is for ESMA to identify which other CCPs the clearing member is a member of in order to assist with establishing a risk profile, this is not information that TC-CCPs would generally have access to. Depending on the account structure of the relevant clearing member and as mentioned above in response to Question 1, the identity of EU clients and indirect clients is likely not known to the TC-CCP. As a result, this indicator appears to require TC-CCPs to provide more information than it has access to.

Certain aspects of Indicator 10 appear to be very similar to Indicator 3, both of which require information to be provided on EU and non-EU clearing members. There may be scope for rationalisation between these two indicators or, if ESMA is of the view that the two indicators should remain distinct, further clarification on the difference between the information expected under each of these indicators to be provided.

In respect of Indicator 11, we do not believe that access to a TC-CCP is in itself an indicator of systemic relevance. As currently drafted, it is not clear whether Indicator 11 is relevant to the size of the CCP's membership, which we note may be a critical factor in determining systemic risk. As a point for reflection, it is worth discussing whether Indicator 11 refers to the issue of the "CCP membership size", based on the assumption, that in general terms, the size of membership could be a critical factor for successful risk mutualization in a CCP."

Q5 Do you generally agree with the proposed indicator as specified above (Indicator 12) to further assess alternative clearing services? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

In respect of Indicator 12, we do not believe that the assessment of alternative clearing services will in itself be a valid indicator for the existence or presence of systemic risk.

Q6 Do you generally agree with the proposed indicators as specified above (Indicators 13 and 14) to further assess relationships, interdependencies, or other interactions? Please elaborate and if you disagree with any specific indicator, please suggest an alternative one to measure the relevant criterion.

We note that the assessment of outsourcing arrangements in this context appears to be contrary to the process which has been followed to date. Traditionally, financial regulators would assess the regulated entities under their jurisdiction and determine whether the outsourcing arrangements of those entities as service recipients are significant. Regulators have various powers in this respect.

In respect of Indicator 14, we agree that this is a relevant indicator (particularly given that other jurisdictions take this approach) but note that, given that this is a quantitative indicator, an optimum standard with which ESMA expects the TC-CCP to comply should be specified. Besides, it is unclear if this would be an indicator of more/less systemic importance. For example, if ESMA considers that a direct connection by TC-CCPs to EU FMIs implies an

increased level of risk to the EU, then TC-CCPs may be incentivised to connect indirectly, which could in practice increase the risk.

Q7 Do you identify other benefits and costs not mentioned above associated to the proposed approach (option 3)? If you advocated for a different approach, how would it impact this section on the impact assessment? Please provide details.

We support the adoption of Policy Option 3, in particular the fact that it incorporates the principle of proportionality. However, as currently structured, the information required to be provided is too granular and, in some cases, would be disproportionate for non-systemically important CCPs to provide. Our recommendations set out above would streamline the criteria and indicators to ensure that they are structured in a proportionate fashion.

Policy option 3 is, in our view, compatible with the suggestions made in our responses above, which primarily are focused on structuring the indicators in a way as to provide for priority and non-priority factors, with objective standards used and examples provided.

Although the level 1 text provides that ESMA must consider all indicators, it does not specify how it should do so. As such, we are of the view that ESMA has flexibility to determine the way in which it wishes to assess TC-CCPs against the criteria, and how the indicators should interact in order to provide for a structured approach to the assessment. In particular, as noted in our responses above, a definition of systemic risk will be crucial to framing the assessment and will set a guideline on what indicators will be more important than others for the purpose of tiering CCPs.

3. Response to consultation on Technical Advice on Comparable Compliance under article 25a EMIR

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?

We understand that comparable compliance will be assessed at the level of the TC-CCP, rather than at a jurisdictional level, and will involve a “requirement-by-requirement” assessment. This differs to the equivalence regime currently existing under other EU financial services legislation, which typically requires a comparison of the regulatory and supervisory regime in a particular jurisdiction as a whole, rather than a comparison of the rules applied by individual firms or entities. However, there are circumstances, where the European Commission takes a more granular approach to evaluating another jurisdiction's requirements and in this case, we believe that should be recognised in any comparable compliance assessment that is done by ESMA.

Although we acknowledge that elements of a requirement-by-requirement approach may be helpful in conducting an assessment as to whether a TC-CCP can be deemed to be comparably compliant with the relevant EMIR requirements, there is a risk that this approach may result in a TC-CCP operating in a jurisdiction in which the rules applicable are deemed by the Commission to achieve the same regulatory outcome as across the EU, but on a requirement-by-requirement level ESMA may consider that the rules applied by the TC-CCP may not compare sufficiently. In such a situation, where the requirements applied by a TC-CCP are determined by ESMA to not be comparable, it will be required to comply with the EMIR requirements.

We recommend that ESMA's comparability analysis and final assessment approach should be consistently applied to all CCPs. We understand that the four-step approach proposed by ESMA to structure the comparability determination process is intended to ensure this consistency. In addition, it is important to ensure that, following its comparability analysis, ESMA's final assessment of the comparability of each requirement is genuinely outcome based taking due account of the equivalence decision adopted by the Commission with respect to the TC-CCP's home jurisdiction and the extent to which the financial instruments cleared by the TC-CCP are denominated in Union currencies (see EMIR 2.2. Recital (41)).

ESMA may wish to consider whether a deviation from one of the requirements in EMIR could be offset by compliance with another more conservative provision corresponding to another EMIR requirement, so that on the whole, the third country requirements applied by the TC-CCP in question would allow it to deliver the practical outcome of ensuring that EMIR's regulatory objectives on the relevant issue are achieved. Further, even if requirements are closely related (e.g., requirements for margining, liquidity risk management, stress testing, etc.), a strict line-by-line approach may not allow ESMA to look at requirements holistically or make an outcomes-based determination of a TC-CCP's comparable compliance, which we do not believe was the intention of EU legislators. For example, one requirement may specify the minimum margin period of risk for a given product

without accounting for the origin of the account type clearing the product (e.g., customer or house) and another requirement may specify how account types must be margined (e.g., net versus gross). While looking at these requirements collectively, a CCP may be required to margin a customer account on gross-basis, implying a lower margin period of risk may be sufficiently risk mitigating, in comparison to where the same products in a customer account may be margined on a net-basis. This scenario is particularly concerning in the case of a comparable compliance assessment being conducted relative to requirements that have been identified as Core Provisions, since a TC-CCP could be required to adopt an EMIR floor to its practices, which would be in spite of its practices potentially already yielding outcomes that are at least as strict or conservative as those under EMIR. Consequently, a strict line-by-line approach could undermine the ability of ESMA to recognise the correlation between different provisions and therefore, we request these circumstances be able to be appropriately addressed in a comparable compliance assessment.

To facilitate its comparability assessment work, ESMA should liaise with third country regulators, and in particular with those who already have assessed the comparability of the EU CCP regime, in order to ensure that ESMA has a comprehensive picture and understanding of the rules applicable to the TC-CCP in question as well as how their enforcement is ensured and monitored by the relevant third country regulators across major derivatives markets. Both FIA and ISDA have previously expressed concerns about increased fragmentation of the global listed and cleared derivatives markets due to inconsistent and duplicative regulatory frameworks,³ and advocate a regime which provides for regulators to rely on their counterparts in other jurisdictions to supervise certain cross-border activity where they have implemented a regulatory regime that achieves comparable outcomes (the so called “deference” or “substituted compliance” approach). We recommend that ESMA also follows a similar outcomes-focused approach here.

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

In respect of Table 1 (Core provisions as minimum elements to be assessed for comparable compliance (Annex I to the Delegated Act)), as a starting point, we suggest that ESMA follow the approach set out in recital 41 of EMIR 2.2, which provides that: (i) 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 EMIR and any conditions to which the application of that implementing act may be subject; and (ii) the extent to which the financial instruments cleared by the CCP are denominated in Union currencies. We understand that the information required to be provided by TC-CCPs which have submitted a request for comparable compliance is intended to allow ESMA to determine whether and how the TC-CCPs in question are implementing the rules of the third country which have been deemed equivalent by the Commission, as well as the possible conditions attached to the equivalence determination.

In our view, Table 1 should not be annexed to the Delegated Act for four reasons:

³ <https://fia.org/articles/fia-warns-increased-market-fragmentation-caused-regulation> and <https://www.isda.org/a/wpgME/Regulatory-Driven-Market-Fragmentation-January-2019-1.pdf>.

- (a) Table 1 currently includes (i) references to sub-sections of EMIR; and (ii) the RTS. It is unlikely that the rules of a third country would be specified in such detail as to mirror the detailed provisions set out in sub-sections of EMIR and the RTS. As such, annexing Table 1 to the Delegated Act would unduly constrict ESMA in such a way as to mean that ESMA would unlikely be in a position to reach a positive determination of comparable compliance for any TC-CCPs. Instead, we suggest that ESMA take a holistic view to assessing comparable compliance, and consider whether the regime to which the TC-CCP is subject is comparable to EMIR as a whole. For example, if the TC-CCP is subject to certain, more conservative provisions in some respects and less conservative provisions in others, the provisions taken as a whole mean that in practical terms the TC-CCP is subject to a regime that achieves the same regulatory outcomes as EMIR.
- (b) The detail of the required information to be provided by Tier 2 TC-CCPs seeking a comparable compliance determination by ESMA is likely to place a significant cost and resource burden on each entity, which may lead some of them (smaller Tier 2 TC-CCPs) to withdraw from the EU market, to the detriment of EU clients. However, whether this will in practice have an impact will largely depend on the interplay between the rules relating to tiering and the rules relating to comparable compliance, and our assumption in this regard is that smaller TC-CCPs will not be classified as Tier 2. If a large number of TC-CCPs will be determined to be Tier 2 CCPs, then the risk of a high number TC-CCPs being unable to manage the process of providing all of the relevant information will be higher.
- (c) By including the level of detail currently specified in Table 1, the risk of conflicts arising between the laws in the third country and the rules in EMIR is significant. As above, an outcomes focused approach would ensure that the TC-CCP complies with comparable standards, but would not require the third country jurisdiction to have in place detailed rules which mirror those set out in EMIR.
- (d) ESMA would arguably introduce new policy objectives by annexing Table 1 to the Delegated Act, contrary to the Level 1 text.

Implications for the TC-CCP

We also recommend that ESMA clarify the practical impact of a comparable compliance determination, particularly in respect of ESMA's supervisory powers over the TC-CCP. In particular, when a TC-CCP is determined to meet the standard of comparable compliance, ESMA should coordinate with the third country supervisor when exercising its supervisory activities (for example, if it wishes to carry out an investigation into the TC-CCP). It should also rely on the third country supervisors to enforce the TC-CCP's compliance with the comparable requirements under the rules of the third country. As stated earlier, this approach is consistent with both FIA's and ISDA's earlier published papers⁴.

ESMA should also clarify the details of the process and timeline involved for a TC-CCP in the event that it is later determined to no longer meet the comparable compliance requirements.

⁴ See footnote 3.

We support ESMA's proposal to consult the TC-CCP and the third country supervisor in the event that it intends to reject a request for comparable compliance before coming to a final determination. In our view, the final delegated act should reflect this.

Confidentiality

As a general matter, the information required to be provided by TC-CCPs to ESMA is extensive and is likely to include commercial and other sensitive information. ESMA should be clear in its consultations and provide confirmation that it will hold all information received in the strictest of confidence.

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?

We support an outcomes focused approach for ESMA's comparability analysis, rather than a strict line-by-line approach, in order to ensure that TC-CCPs which are subject to conservative rules in their home jurisdiction are not determined to be non-compliant on the basis of a minor deviation from one of the EMIR requirements. ESMA proposes that for a TC-CCP jurisdiction's requirements to be assessed as "*comparable*" to the core provisions of EMIR, those requirements must be "*equal or at least as strict or conservative as, the corresponding*" EMIR requirements. Where a requirement is not "*equal or at least as strict or conservative as the corresponding requirement under EMIR*", the TC-CCP must adopt the EMIR requirement as a floor or minimum, through rules, policies, and procedures. By requiring that a TC-CCP jurisdiction's requirements be "*equal or at least as strict or conservative as the corresponding requirement under EMIR*", ESMA is proposing an approach that contradicts the Group of Twenty's ("G20") commitment to adopting an approach of mutual regulatory deference with respect to the cross-border oversight of global derivatives markets. In line with its commitments in September 2009, the G20 declared in September 2013 "that jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on "*similar outcomes*".⁵ As set out in Consultation Report "Technical Advice on Comparable Compliance under Article 25a of EMIR", an "*interpretation...whereby any requirement in the third country would be considered non-comparable if it is not equal or at least as strict...or conservative... as the corresponding EMIR requirement, would not be in accordance with Article 25a(3) of EMIR, where such requirements still achieve the regulatory objectives*". We request that ESMA consider whether an assessment based on the 'appropriate similarity' of requirements would be more appropriate. Moreover, as noted in our response to Question 1, it is important that, in its final assessment, ESMA takes a holistic approach and consider whether a deviation identified in relation to one of the requirements in EMIR could be offset by compliance with another more conservative provision corresponding to another EMIR requirement so that, on the whole, the third country

⁵ Group of 20, Leaders' Statement, Pittsburgh Summit, pg. 7 (Sept. 2009), available at https://www.fsb.org/wp-content/uploads/g20_leaders_declaration_pittsburgh_2009.pdf; Group of 20, Leaders' Declaration, Saint Petersburg Summit, pg. 17 (Sept. 2013), available at https://www.fsb.org/wp-content/uploads/g20_leaders_declaration_saint_petersburg_2013.pdf.

requirements applied by the TC-CCP in question would allow it to achieve the regulatory objectives of the EMIR requirements.

As drafted, ESMA appears to have discretion as to whether to liaise with the authority in the home country of the TC-CCP in the event that it determines that such TC-CCP does not have comparable compliance. Given the impact that such a determination would have on the TC-CCP, we suggest that ESMA should be required to liaise with the relevant authorities in all cases in order to assist with their assessment and any conclusions reached.

In addition, ESMA should clarify what compliance on an outcomes basis entails and whether there is any difference from the Step 3 analysis of "*substantially achieving the regulatory objectives of the corresponding EMIR requirements and effectively reflecting the Union's interests as a whole*" (as set out in Consultation Report "Technical Advice on Comparable Compliance under Article 25a of 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?

If the core elements set out in Table 1 are specified in the Commission's Delegated Act, we are of the view that they should be drafted in a less specific way and the regulatory objective of each of the provisions should be included instead. As the regime appears to mandate a "requirement by requirement" assessment, in the absence of a requirement to take into account the overarching regulatory objective of each provision, it will be difficult for a TC-CCP to comply with the core provisions in all respects, particularly given that CCPs generally have complicated and varying structures.

Accordingly, we are of the view that the core provisions specified in Table 1 are too detailed and prescriptive. If compliance with each of the core provisions specified in Table 1 is required without any scope to take into account rules which achieve a similar regulatory objective, the comparable compliance regime will be excessively strict and will make it very difficult for any TC-CCP to meet each requirement in practice, which may also have political implications.

ESMA should also consider that consistency in the assessment is maintained.

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?

We agree in principle but we suggest ESMA make provision in its guidance for alternative routes to compliance where compliance with the EMIR requirement would be legally impossible for the TC-CCP or would expose it to legal risks.

For example, it is a requirement under EMIR for CCPs to offer both individually segregated and omnibus customer accounts. Under U.S. rules however, there is only provision for omnibus

accounts (with respect to futures) or "legally segregated, operationally co-mingled" (LSOC) accounts (with respect to over-the-counter derivatives). Individually segregated accounts are not in fact recognised by the U.S. bankruptcy code as this level of segregation goes beyond what is contemplated by U.S. laws. As a result, a U.S. CCP attempting to offer both types of accounts in order to satisfy the "floor" EMIR requirement, would be exposed to legal risk and may in fact be prohibited to launch such accounts by its regulator. Although ESMA acknowledges that account structures in third countries may differ to EU account structures, there is still a concern that a TC-CCP may not be determined to be comparably compliant due to the rules existing in their home jurisdiction. In order to avoid this and similar other issues, we therefore suggest that ESMA apply a more outcomes-based approach.

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?

See answer in Q4.

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?

We agree in principle subject to the following suggestions:

- (i) ESMA should allow a TC-CCP to submit further information in the event of a non-comparability determination; and
- (ii) ESMA should set time limits for the comparability assessment and mapping exercise as well as allow a TC-CCP a certain time limit in which it may request a re-assessment of its tier 2 determination or non-comparability assessment.

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?

Yes.

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?

This requirement is likely to impose a significant compliance and cost burden for TC-CCPs. We suggest that ESMA liaise with the relevant authority in the third country in the first instance and only use this provision in exceptional circumstances, such as when the information provided is very technical and cannot be easily checked by reference to the relevant TC-CCP's rulebook. If this approach is adopted, mandatory conditions should specify certain conditions as to when this provision can be utilised.

In relation to the provision of a legal opinion, it is unlikely that a comparative legal analysis will be possible or relevant. We instead propose that ESMA be satisfied with a statement by the appropriately qualified counsel conducting the mapping.

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?

-

About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry.

FIA's mission is to:

- support open, transparent and competitive markets,
- protect and enhance the integrity of the financial system, and
- promote high standards of professional conduct.

As the leading global trade association for the futures, options and centrally cleared derivatives markets, FIA represents all sectors of the industry, including clearing firms, exchanges, clearing houses, trading firms and commodities specialists from more than 48 countries, as well as technology vendors, lawyers and other professionals serving the industry.

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 71 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy

and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on Twitter @ISDA.

About AFME

The Association for Financial Markets in Europe (AFME) is the voice of all Europe's wholesale financial markets, providing expertise across a broad range of regulatory and capital markets issues.

We represent the leading global and European banks and other significant capital market players.

We advocate for deep and integrated European capital markets which serve the needs of companies and investors, supporting economic growth and benefiting society.

We aim to act as a bridge between market participants and policy makers across Europe, drawing on our strong and long-standing relationships, our technical knowledge and fact-based work.