



European Securities and
Markets Authority

Final Report

Final technical advice on criteria for tiering under Article 25(2a) of EMIR 2.2





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Acronyms

CCP	Central Counterparty
TC-CCP	Third country CCP
CM	Clearing Member
EMIR	European Market Infrastructures Regulation – Regulation (EU) 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories (as amended).
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
ETD	Exchange Traded Derivatives
IM	Initial Margin
NCA	National Competent Authority
OTC	Over-the-counter
PFMIs	CPMI-IOSCO Principles for Financial Market Infrastructures
SFT	Securities Financing Transaction
TV	Trading venue or execution platform
VM	Variation Margin

DEFINITIONS for the purpose of this Final Report

EU CM means any CM established in the Union (including CMs established in Norway, Lichtenstein and Iceland) and any CM established or registered outside of the Union, but which belongs to a group where the parent undertaking is established or where its head office is in the Union.

Non-EU CM means a CM not qualifying as an EU CM.

EU client means a CM's client established in the Union and any client established outside of the Union, but which belongs to a group where the parent undertaking is established or where its head office is in the Union.

EU indirect client means a CM's indirect client established in the Union and any indirect client established outside of the Union, but which belongs to a group where the parent undertaking is established or where its head office is in the Union.



EU entity means an entity established in the Union including entities not established or registered in the Union, but which belong to a group where the parent undertaking is established or where its head office is in the Union.

Union Currency means any of the Union currencies including the currencies of Norway (NOK), Lichtenstein (CHF) and Iceland (ISK).

Asset class means a reference to relevant class of financial instruments including: bonds, structured finance products, securitised derivatives, interest rate derivatives, equity derivatives, commodity derivatives, foreign exchange derivatives, credit derivatives, C10 derivatives, CFDs, emission allowances and emission allowance derivatives.

Sub-asset class means a reference to an asset class segmented to a more granular level on the basis of the contract type and/or the type of underlying.

1 Executive Summary

Reasons for publication

On 13 March 2019, the European Parliament, the Council and the Commission reached a political agreement on the review of the regulatory framework for the authorisation and supervision of CCPs established in Title III of Regulation 648/2012 (EMIR 2.2). While the legislative process for the adoption of the proposed regulation amending EMIR in this respect was in the final stages, ESMA initiated its preparatory work for the implementation of the new regime for third-country CCPs (TC-CCPs).

This review of EMIR introduces a new category of TC-CCPs, the systemically important or likely to become systemically important 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)).

It also introduces a set of criteria to be taken into account by ESMA to determine whether a TC-CCP is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States. A TC-CCP determined as systemically important will be considered a Tier 2 CCP for the purpose of EMIR.

Under the new regime the Commission has to adopt a delegated act to further specify the tiering criteria and the Commission shall endeavour to consult ESMA before adopting such a delegated act. ESMA received a provisional mandate on 3 May 2019 to provide technical advice for the development of the corresponding Delegated Act, on the basis of which ESMA ran a consultation, and on 30 October 2019 the mandate was confirmed (see Annex).

ESMA published a Consultation Paper with its draft technical advice on how to further specify the tiering criteria on 28 May 2019. The consultation ended on the 29 July 2019. ESMA received 21 answers, out of which 3 were confidential.

This Final Report takes into account the feedback provided by the respondents to the consultation and contains ESMA's technical advice to the Commission.

Content

This Final Report presents ESMA's final technical advice. Section 4 discusses how to further specify the criteria. Section 5 contains the Annexes; the mandate for



ESMA to develop this technical advice(Annex I), the cost-benefit analysis (Annex II) and the final technical advice (Annex III).

Next Steps

ESMA is providing its technical advice to the Commission. The Commission is empowered under EMIR to adopt a delegated act in accordance with Article 82 to further specify the criteria as set out in Article 25(2a) of EMIR within 12 months from the entry into force of EMIR 2.2.

2 Introduction

1. On 13 June 2017 the European Commission (the Commission) published a proposal for amendments to the regulation on OTC derivatives, central counterparties and trade repositories and the regulation establishing European Securities and Markets Authority (ESMA). The objective of the proposal was for the EU to equip “its Capital Markets Union with a more effective and consistent supervisory system for CCPs, in the interest of further market integration, financial stability and a level-playing field”.
2. These amendments are often referred to as EMIR 2.2. EMIR 2.2 was adopted by the European Parliament and the Council on the 15 October 2019 with its signature into law on 23 October 2019¹ and EMIR 2.2 will enter into force on the twentieth day following that of its publication in the Official Journal.
3. Given the growing importance of CCPs in the financial system and the global increase in clearing and concentration of risks in a limited number of global CCPs, the framework for recognition and supervision of TC-CCPs has been enhanced with the introduction of EMIR 2.2. In particular, a two-tier system for TC-CCPs based on their systemic importance has been introduced. Where a TC-CCP is determined as systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States, such TC-CCP will be considered a Tier 2 TC-CCP (Tier 2 CCP) by ESMA in accordance with Article 25(2a) of EMIR². A TC-CCP that has not been determined as systemically important or likely to become systematically important for the financial stability of the Union or of one or more of its Member States, is considered a Tier 1 TC-CCP (Tier 1 CCP).
4. The consequence of ESMA considering a TC-CCP as a Tier 2 CCP is that such TC-CCP can only be recognised and permitted to provide clearing services or activities in the Union if it meets additional conditions to the conditions applicable to Tier 1 CCPs. The reason for these additional conditions is to address the concerns that may arise for the financial stability of the Union or of one or more of its Member States.
5. The box below sets out the relevant provisions in Article 25(2a) of EMIR providing the criteria for tiering and the Recital clarifying those provisions.
6. The Commission is tasked with adopting a delegated act in accordance with Article 82 to further specify the criteria as set out in Article 25(2a) of EMIR within 12 months from the entry into force of EMIR (second subparagraph of Article 25(2a)).
7. Box 1: Recital 31 of EMIR 2.2 and Article 25(2a) of EMIR on tiering of TC-CCPs.

¹ 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 was adopted by the European Parliament and the Council on 15 October 2019 and the final act was signed into law on 23 October 2019 – see <https://data.consilium.europa.eu/doc/document/PE-88-2019-REV-1/en/pdf>. It is soon to be published in the EU Official Journal.

² 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.

Recital 31 EMIR 2.2

(31) When considering the application of a third-country CCP for recognition, ESMA should assess the degree of systemic risk that the CCP presents to the financial stability of the Union or of one or more of its Member States on the basis of objective and transparent criteria set out in this Regulation. Those criteria should contribute to the overall assessment. Individually, none of those criteria should be considered determinative on its own. Where assessing the risk profile of a third-country CCP, ESMA should consider all risks, including operational risks, such as fraud, criminal activity, IT- and cyber-risk. A Commission delegated act should specify further those criteria. In specifying those criteria, the nature of the transactions cleared by the CCP, including their complexity, price volatility and average maturity, as well as the transparency and liquidity of the markets concerned and the degree to which the CCP's clearing activities are denominated in euro or other Union currencies should be considered. In that regard, specific features concerning certain agricultural derivative contracts listed and executed on regulated markets in third countries, which relate to markets that largely serve domestic non-financial counterparties in that third country which manage their commercial risks through those contracts, may pose a negligible risk to clearing members and trading venues in the Union as they have a low degree of systemic interconnectedness with the rest of the financial system. Where a framework for the recovery and resolution of CCPs is in force in a third country, that should also be taken into account by ESMA in its analysis of the degree of systemic risk that the applicant CCP established in that third country presents to the financial stability of the Union or of one or more of its Member States.

Article 25(2a) EMIR

"2a. ESMA shall, after consulting the ESRB and the central banks of issue referred to in point (f) of paragraph 3, determine whether a third-country CCP is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States (Tier 2 CCP) by taking into account all of the following criteria:

(a) the nature, size and complexity of the CCP's business in the Union, and outside the Union to the extent its business may have a systemic impact on the Union or on one or more of its Member States, including:

(i) the value in aggregate terms and in each Union currency of transactions cleared by the CCP, or the aggregate exposure of the CCP engaged in clearing activities to its clearing members and, to the extent the information is available, their clients and indirect clients established in the Union, including where they have been designated by Member States as other systemically important institutions (O-SIIs) pursuant to Article 131(3) of Directive 2013/36/EU; and

(ii) the risk profile of the CCP in terms of, amongst others, legal, operational and business risk;

(b) the effect that the failure of or a disruption to the CCP would have on:

(i) financial markets, including the liquidity of the markets served;

(ii) financial institutions;

(iii) the broader financial system; or

(iv) the financial stability of the Union or of one or more of its Member States;

(c) the CCP's clearing membership structure including, to the extent the information is available, the structure of its clearing members' network of clients and indirect clients, established in the Union;

(d) the extent to which alternative clearing services provided by other CCPs exist in financial instruments denominated in Union currencies for clearing members and, to the extent the information is available, their clients and indirect clients established in the Union;

(e) the CCP's relationships, interdependencies, or other interactions with other financial market infrastructures, other financial institutions and the broader financial system to the extent that that is likely to have an impact on the financial stability of the Union or one or more of its Member States.

The Commission shall adopt a delegated act in accordance with Article 82 to specify further the criteria set out in the first subparagraph by ... [12 months from the date of entry into force of this Regulation].

Without prejudice to the outcome of the recognition process, ESMA shall, after conducting the assessment referred to in the first subparagraph, inform the applicant CCP whether or not it is considered to be a Tier 1 CCP within 30 working days of the determination that that CCP's application is complete in accordance with the second subparagraph of paragraph 4.

8. ESMA was mandated by the Commission to provide technical advice on the criteria to be taken into account by ESMA when assessing the systemic nature of TC-CCPs.
9. ESMA published on 28 May 2019 its consultation paper³ containing its draft technical advice. The consultation ended on 29 July 2019. ESMA received 21 responses. This final report contains, along with the assessment of the feedback to each specific question and topic, ESMA's technical advice to the Commission on how to further specify the criteria for tiering in Article 25(2a) of EMIR.

3 Structure of the Consultation Paper

10. This final report covers some main features of the consultation responses, ESMA considerations on some of the responses received and the way those will be reflected in this final technical advice to be provided to the Commission in relation to the delegated act on the tiering criteria the Commission shall adopt under Article 25(2a) in EMIR.
11. In particular:
 - Section 4.1 provides ESMA's general approach to tiering.
 - Section 4.2 provides general feedback from the consultation
 - Section 4.3 provides feedback on Article 1, indicators 1-5

³ <https://www.esma.europa.eu/press-news/esma-news/esma-consults-tiering-comparable-compliance-and-fees-under-emir-22>
https://www.esma.europa.eu/sites/default/files/library/esma70-151-2138_cp_ta_on_tiering_criteria.pdf

Section 4.4 provides feedback on Article 2, indicators 6-9.

Section 4.5 provides feedback on Article 3, indicators 10-11.

Section 4.6 provides feedback on Article 4, indicator 12.

Section 4.7 provides feedback on Article 5, indicators 13-14.

12. The annexes include:

Annex I the mandate to ESMA;

Annex II the cost-benefit analysis; and

Annex III the technical advice.

4 Tiering - How to further specify the tiering criteria?

4.1 ESMA general approach to tiering

13. Article 25(2a) of EMIR introduces a set of criteria to be taken into account by ESMA to determine whether a TC-CCP is a Tier 2 CCP. Recital 31 of EMIR provides additional clarifications for the purposes of Article 25(2a) that ESMA's assessment of the degree of systemic risk of a TC-CCP should be based on the objective and transparent criteria listed in Article 25(2a) of EMIR. The recital clarifies that "These criteria should contribute to the overall assessment." and, in addition "Individually, none of these criteria should be considered determinative on its own". ESMA is proposing a set of indicators that will further specify the criteria to assess whether a TC-CCP is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States. The set of criteria covers a wide range of considerations and are a combination of qualitative and quantitative components. This is also reflected in the indicators. ESMA has to take into account all criteria. Hence the indicators are to be used as tools in the assessment of a TC-CCP and ESMA envisages that each one of the criteria should have at least one indicator. Each indicator is therefore "mapped" against a criterion.
14. The Commission should further specify the criteria and in doing so, the clarification provided by Recital 31 should be taken into account, "In specifying those criteria, the nature of the transactions cleared by the CCP, including their complexity, price volatility and average maturity, as well as the transparency and liquidity of the markets concerned and the degree to which the CCP's clearing activities are denominated in Euro or other Union currencies should be considered."
15. It is further noted in Recital 31 that specific features concerning certain agricultural derivative contracts listed and executed on regulated markets in third countries which relate to markets that largely serve domestic non-financial counterparties in such third-country, who manage their commercial risks through those contracts, may pose a negligible risk to EU CMs and EU TVs as they have a low degree of systemic interconnectedness with the rest of the financial system. ESMA is also expected to take into account if there is a

framework for CCP recovery and resolution in force in such third-country when assessing the degree of systemic risk that the CCP established in that third-country presents to the financial stability of the Union or of one or more of its Member States.

4.2 General Feedback from the consultation

4.2.1 Feedback on the general approach and the proposed indicators

16. There is broad support for the general approach under EMIR 2.2 enabling EU policy makers and regulators to appropriately evaluate and distinguish between TC-CCPs, rather than apply a one-size-fits-all treatment. However, whilst the approach taken by ESMA to closely follow the wording of EMIR 2.2 as explained in its recital is generally supported, the consultation responses raise the question on how the systemic importance and risk profile of the TC-CCP should be assessed based on the consideration of all of the criteria collectively taking into account broader regulatory outcomes, rather than identifying a single criterion as being determinative.

4.2.1.1 Scope of the technical advice

17. The extent of indicators is challenged as too extensive. Some respondents believe that not all indicators are relevant to assess systemic importance and are just providing information generally on the CCP and its business. Another reflection is that the wide list of indicators does not facilitate the determination of the systemic importance of a TC-CCP for the Union, especially where the consultation paper does not provide for the corresponding rationale and where the indicators are not described in a measurable way.

18. The respondents further note that the inability for TC-CCPs to pre-assess the likelihood of being tiered as a Tier 2 CCP and the lack of transparency of the process of determination by ESMA. The respondents are requesting information on the assessment of the indicators, if there will be thresholds, benchmarks or other indications as such aspects are not part of the draft technical advice. They argue that the consultation paper does not provide any indication on how the indicators and the information gathered will determine the greater or lesser systemic importance to the Union of the relevant TC-CCP nor how ESMA would use the information to make its determination on whether a CCP is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States and that further clarity in this regard should be provided.

19. Some respondents are worried, due to the lack of details as to the assessment, that the aim of the complete range of indicators is to capture a wide range of TC-CCPs, where many, if not most, TC-CCPs may be candidates for Tier 2, having in mind that Tier 2 CCPs may only offer their services into the Union provided they meet at least EMIR standards. While it is true that Tier 2 CCPs need to comply with EMIR, it is certainly not true that the objective of the technical advice is to determine the majority of TC CCPs as Tier 2. Moreover, the determination of systemic risk is a complex exercise and different elements need to be considered to make such a determination.

20. The main arguments why ESMA will not publish any guidance as to its assessment of TC-CCPs in the technical advice is that this is outside the scope of the delegated act and hence outside the scope of the mandate provided to ESMA under Article 25(2a). There is no legal mandate to consult and publish advice on the modalities and processes for ESMA's assessment for conducting the tiering assessment. The objective of the technical advice is to further specify what ESMA has to take into account in its assessment and not how this will be done. However, ESMA will further reflect and exchange with the relevant stakeholders on how to provide additional transparency on the application of the regulatory framework.
21. The intention behind the complete list of indicators is to ensure that the indicators match the criteria and cover the aspects detailed in the recital. The intention is a holistic approach as outlined in the consultation paper and this has the advantage of being both future proof and flexible by being able to consider different types of CCPs and to be able to accommodate them accordingly.
22. There are five criteria listed in Article 25(2a) of EMIR and the list of indicators, as proposed in the technical advice, derives from the requirement to further specify these criteria.
23. Another reason for providing a full list of indicators is to ensure the indicators presented cover many different types of CCPs and different types of activities. This approach preserves the comprehensiveness of the assessment and the flexibility to make qualitative judgements on the risk profile of each CCP. Tiering is a complex determination, where many different factors and assessments need to be taken into account, which is incompatible with presenting a methodology as to the assessment ESMA will conduct in relation to tiering.
24. In addition, the complex determination of tiering is underpinned by the well-structured and robust governance around such a decision. The process for the determination is governed by EMIR 2.2 and includes both consultation of ESRB and central banks of issue.
25. Another comment in relation to scope is that not all tiers of TC-CCPs envisioned under EMIR 2.2 are addressed in the consultation paper and the reason for this is that the mandate covers Article 25(2a), to further specify the criteria to tier TC-CCPs and does not cover any assessment under Article 25(2c) assessing a TC-CCPs substantial systemic importance.
26. ESMA has reflected on the specific comments in respect of the justifications to be provided for the individual indicators and their link to the systemic impact to the Union or any of its Member States. There are five criteria and each criterion will need to be further specified by at least one indicator hence, as further explained below, the relevance of each indicator for the nexus to the Union or for one or more of its Members States will impact the use of the indicators within the assessment of the TC-CCP. This final technical advice therefore provides further reasons and rationale for the different indicators and also limit their scope where possible without leaving any aspect of the regulation uncovered.
27. In addition, to accommodate the comments on the extensiveness of the indicators, ESMA has amended some of the indicators to, where possible, present a more focused and limited

approach. ESMA has also accommodated some of the comments raised in relation to a specific indicator and these changes are presented under each respective indicator.

28. The information required to be provided by the applicant CCP in the process of the application under Article 25(4) of EMIR, is further considered under section on “Information”. However, the final assessment of the TC-CCP will be based on the criteria relevant for the TC-CCP at hand and will therefore be assessed based on how its activity may be determined systemically important for the Union or for one or more of its Member States.

4.2.1.2 Definition of Systemic importance/Systemic Risk

29. Several respondents requested further details on the concept of “systemically important” and how ESMA envisages to consider this in relation to their determination of “whether a CCP is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States by taking into account all of the following criteria”.

30. One reference provided is the Bank of International Settlements (BIS) definition of systemic risk as “a risk of disruption to financial services that is caused by an impairment of all or parts of the financial system and has the potential to have serious negative consequences for the real economy⁴.” Another definition of systemic risk is “a risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy⁵”.

31. The report of the IMF, the BIS and the FSB, of 28 October 2009, presented to the G-20 Finance Ministers and Central Bank Governors, entitled ‘Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments⁶’.

“The assessment of systemic importance will be conditioned by a number of considerations. The assessment is likely to be time-varying depending on the economic environment. It will also be conditioned by the financial infrastructure and crisis management arrangements, and their capacity to deal with failures when they occur. Institutions may be systemically important for local, national or international financial systems and economies.[...]”

Three key criteria that are helpful in identifying the systemic importance of markets and institutions are: size (the volume of financial services provided by the individual component of the financial system), substitutability (the extent to which other components of the system can provide the same services in the event of a failure) and interconnectedness (linkages with other components of the system). [...]

⁴ <https://www.bis.org/publ/othp08.htm>

⁵ <https://www.esrb.europa.eu/shared/pdf/ESRB-en.pdf>, Article 2.

⁶ <https://www.imf.org/external/np/g20/pdf/100109.pdf>



An assessment based on these three criteria should be complemented with reference to financial vulnerabilities and the capacity of the institutional framework to deal with financial failures. Indicators of financial vulnerabilities include: leverage, liquidity risks, maturity mismatches, and complexity, including the group structures and business models of large institutions. Key elements of the institutional framework include clearing and settlement systems, and the arrangements for handling institutional and market failures should they occur.“

32. In ESRB’s assessment of the clearing obligation the risks of a disruption to financial services caused by a significant impairment of all or parts of the Union financial system they noted that regardless of whether this impairment occurs in groups of Member States or only in individual Member States this could potentially have serious negative consequences for the internal market and the real economy⁷.
33. Hence, to assess “systemic importance” is a complex process and requires several aspects to be considered and this is one of the reasons the indicators aim to cover several aspects relevant in the determination for systemic importance.

4.2.2 Proportionate approach

34. Some respondents stress that due to the extensive set of indicators the determination of systemic importance would benefit from some kind of sequenced approach in its assessment. There is a concern that TC-CCPs may be disincentivised from applying for recognition on the basis that it would be too onerous given the volume and granularity of information required to be provided. Different suggestions were provided by respondents to the consultation on how a tiered process could be implemented, including the following:
- (a) ESMA to "pre-analyse" the relative importance of each TC-CCP based on a few indicators which ESMA considers to be instrumental to its assessment to avoid requiring the potential large amount of information from each TC-CCP to fully assess the 14 proposed indicators. One way to implement this method would be to divide the assessment into two sequential parts to reflect relative importance, focusing first on those quantifiable indicators directly relevant to the impact of failure of the TC-CCP on the financial stability of the EU where, for example, the exposure that EU members have to the TC-CCP and the amount of EU currencies are held by the TC-CCP. This will determine the scale of the systemic risk to the financial stability of the EU, then, where the potential for systemic risk as per the primary consideration is considered sufficiently large, the assessment concerning ownership structure and alternative clearing services can be viewed in contributing to the level of risk of the TC-CCP as a corporate itself.

⁷ https://www.esrb.europa.eu/pub/pdf/other/20160905_ESRB_response_ESMA.en.pdf

(b) To impose a de minimis exemption for smaller TC-CCPs where the assessment shall not be made applicable on those TC-CCPs which are not clearing in any of the currencies of the union or its Member States.

(c) ESMA to rank the indicators by order of importance to assess systemic importance, to identify those which are more important to the assessment and this would make the tiering assessment more predictable.

35. ESMA has read the different suggestions with interest. There are a few aspects to bear in mind in creating a sequenced approach and one is the fact that EMIR 2.2 specifies that all criteria need to be taken into account and that “none of these criteria should be considered determinative on its own”. which prevents the quantitative criteria to be determinative, to allocate a higher weighting to quantitative indicators than to qualitative indicators or to use quantitative indicators in a pre-assigned order of priority thereby risking, in principle, to make one indicator determinative and to deviate from the principle to take all criteria into account. Another aspect is timing, the tiering shall be conducted within 30 working business days after the application is considered complete. The determination by ESMA of whether a TC-CCP is, or likely to, become systemically important and therefore a Tier 2 CCP also contains a consultation process with ESRB and the relevant central banks of issue and such consultation has to be undertaken within the timeframe of the determination.
36. ESMA has considered the possibility of a sequenced approach while developing the draft technical advice, but bearing in mind the limited time to undertake a determination and that all criteria cover a wide range of aspects to be considered in the determination of the tiering of a TC-CCP and as all criteria have to be taken into account already at the “first step”, it was not considered to be a viable solution.
37. It is worth noting that whilst ESMA must assess each and all criteria ESMA does not have to assess each and all indicators and may equally assess aspects not covered by the indicators. Based on this, to ensure proportionality of the indicators and the underlying information required, ESMA uses the expression “ESMA shall consider, to the extent relevant,” to provide flexibility as to the indicators and the factors within each indicator that ESMA will consider depending on the TC-CCP under assessment. ESMA understands that this could entail some discretion and limit the foreseeability, but it will allow reducing the burden of applied indicators to a significant number of TC-CCPs. Given that the entire purpose of the exercise is to determine different categories of TC-CCPs and to treat them differently depending on their category, it appears more proportionate to introduce this flexibility, rather than requiring the exact set of indicators to be assessed in order to ensure equal treatment as the TC-CCPs are different.
38. More importantly, ESMA has provided some guidance as to the aim of the indicators and their relevance in relation to assessing systemic importance for the Union or to one or more of its Member States. ESMA has identified the main indicators corresponding to each of the five criteria to assess the relevance to the Union or one or more of its Member States.

(a) For criterion 1, which focuses on the nature, size and complexity of the TC-CCP, the main initial indicator to consider would be Article 1(1)(b) of the technical advice contained

in Annex III (the TA) (indicator 2), i.e. the financial instruments cleared by the TC-CCP and identifying the Member States where the TC-CCP provides services and specifying whether such instruments are (i) subject to the clearing obligation in the Union, (ii) denominated in or reference a Union Currency, (iii) issued by an EU entity, (iv) commodities relevant for the Union, and/or (v) executed on an EU TV or OTC.

(b) For criterion 2, which focuses on the effect of a failure or a disruption of the TC-CCP, the two main initial indicators to consider would be,

(i) The collateral held by the TC-CCP issued by EU entities, the extent to which EU entities are collateral providers and the extent to which the collateral held at the TC-CCP is denominated in any of the Union currencies (Article 2(1)(a)(i)-(iii) of the TA (indicator 6); and

(ii) Whether the committed/uncommitted or liquid resources of the TC-CCP is committed by EU entities (Article 2(1)(b)(i)-(v) of the TA (indicator 7).

(c) For criterion 3, which focuses on identifying TC-CCP's clearing memberships the main initial indicator to consider would be Article 3(1)(a) of the TA (indicator 10), in identifying the presence of CMs, and in particular EU CMs and to the extent possible, EU clients and EU indirect clients.

(d) For criterion 4, which focuses on identifying substitutions, the indicator to consider would be Article 4(1) of the TA (indicator 12) in conjunction with Articles 1(1)(b) or Article 3(1)(a) of the TA to identify the financial services offered by the TC-CCPs that are relevant to the Union and EU CMs (as well as for EU clients and EU indirect clients) and the extent to which there are available substitutions.

(e) For criterion 5, which focuses on interdependencies, the main initial indicator to consider would be Article 5(1)(b) of the TA (indicator 14), to identify links or connections to the Union through other financial market infrastructures, other financial institutions and the broader financial system.

39. Where a TC-CCP is concluded to be relevant for the Union or one or more of its Member States under (a) to (e) above, the rest of the indicators will be assessed to further explore the scope of the relevance and to determine if the TC-CCP is systemically important. In contrast, where no or no strong relevance to the Union or to one or more of its Member States has been identified under (a) to (e), such TC-CCP would likely to be determined a Tier 1 CCP without the remaining indicators being further explored.

40. Therefore, where ESMA has identified EU CMs, EU clients or EU indirect clients ESMA will further assess the relevance such TC-CCP may have on the Union or one or more of its Member States by carefully assessing the other related indicators;

(a) Article 1(1)(c) of the TA, covering value and volume of cleared transactions at TC-CCP level and CM level but in particular in relation to EU CMs (and where possible EU clients and EU indirect clients), where for example a meaningful level of values or volumes cleared could be one of the signs the TC-CCP is systemically important;

(b) Article 2(1)(a) of the TA covering collateral from EU CMs, identifying, for example, where a meaningful amount of collateral provided by EU CMs (and where relevant EU clients and EU indirect clients), could be one of the signs the TC-CCP is systemically important;

(c) Article 2(1)(b) of the TA covering committed/ uncommitted liquid resources from EU CMs, identifying, for example, where a meaningful amount of committed/ uncommitted liquid resources from EU CMs and where relevant from EU clients or EU indirect clients, could be one of the signs the TC-CCP is systemically important; and

(d) Article 2(1)(d) of the TA covering recovery and resolution, where a meaningful amount may be requested to be paid by CMs including EU CMs and this could be one of the signs the TC-CCP is systemically important.

41. Similarly, where ESMA has identified financial instruments with a relevance for the Union or one or more of its Member States (Article 1(1)(b) of the TA), ESMA will further assess the relevance to the Union or one or more of its Member States by carefully assessing the other related indicators;

(a) Article 1(1)(c) of the TA, covering value and volume of financial instruments cleared by the TC-CCP;

(b) Article 1(1)(d) of the TA, covering the transparency and liquidity of the relevant markets, including the nature, depth and liquidity of the market cleared and whether quotes and/or bid and offer prices are made public; and

(c) Article 3(1)(b) of the TA, covering access to the TC-CCP and the clearing services provided by the TC-CCP considering how to access the TC-CCPs clearing services and if there are legal requirements on the TC-CCP to grant access to clearing services assessed in conjunction with Article 4(1) of the TA considering substitutions.

42. Finally, where ESMA has concluded relevance to the Union or one or more of its Member States under (a) to (e), ESMA may carefully assess the other related indicators;

(a) Article 1(1)(a) of the TA, ownership and business of the TC-CCP;

(b) Article 1(1)(e) of the TA, risks;

(c) Article 2(1)(c) of the TA, settlement and payment; and

(d) Article 5(1)(a) of the TA, outsourcing.

4.2.3 Information

43. In the consultation paper, for explanatory purposes, ESMA listed the information it was considering assessing the indicators. In requesting the information from the TC-CCP, ESMA will apply the principle of proportionality, i.e. not go beyond what is required to achieve the objective of EMIR 2.2 and avoid excessive financial, administrative or procedural burdens for TC-CCPs. When applying proportionality, ESMA will bear in mind



the necessity for equal treatment in the recognition process and the need to ensure the quality and the scope of the assessment.

44. The scope of the information proposed in the consultation paper is challenged in some of the responses to the consultation as to some respondents it is unclear how the collection of a large amount of information will allow ESMA to assess the systemic importance of a TC-CCP to the Union. They also consider that the information to be collected is unnecessary as well as unduly burdensome on smaller TC-CCPs. The very wide information-gathering powers ESMA is proposing to grant itself is, in the view of one respondent, more extensive than the information required by EU-CCPs to demonstrate their compliance with EMIR requirements.
45. The requirement for TC-CCPs to provide ESMA with information necessary for its application follows from EMIR (Article 25(4)) stipulating the information requirement where the applicant CCP shall provide ESMA with all information necessary for its recognition. The information required for the application is further specified in Article 2 of the RTS 153/2013. However, under this Article 2 ESMA will shortly issue a consultation paper on a proposal to amend this Article 2 of RTS 153/2013 to reflect the revised recognition process under EMIR 2.2. It may also be noted that EMIR considers all EU CCPs systemically important and does not establish different requirements depending on their tier, i.e. they are all equally required to comply with EMIR. Whereas for TC-CCPs only Tier 2 CCPs shall comply with EMIR. ESMA has worked to support supervisory convergence in information gathering and bearing in mind that certain requirements under EMIR will now apply to Tier 2 CCPs, ESMA will duly consider this work in applying EMIR to TC-CCP.
46. The concern raised by the respondents is that if all TC-CCPs, regardless of size and importance of their activity in connection with the Union, are required to provide all of the information proposed in the consultation at the outset, they may be disincentivised from applying for recognition. The respondents provide different options to manage the information requirements for tiering by using different “de minimis” or “tiered” approaches along the lines of what is described in paragraph 34.
47. In relation to information, ESMA envisaged that a TC-CCP with no significant clearing activities in or linked to the Union would provide limited information due to the fact that many of the indicators would not be relevant and this would accordingly reduce the burden of information on TC-CCPs with limited connection to Union. Hence, ESMA is considering applying a “waterfall” type of information request for the application, where the TC-CCP will provide information based on relevance, e.g. where the TC-CCP lacks nexus to the Union, the information in relation to further describing the nexus will not be relevant and, thus should not be provided by the TC-CCP in the application for recognition.
48. In relation to already recognised TC-CCPs the respondents question the extent to which ESMA may or should utilise the information it already holds in respect of the TC-CCP, as some of the information listed in Annex VI to the consultation paper overlaps with the information a recognised TC-CCP would have provided in their recognition applications. Whilst ESMA does hold some information the TC-CCP will need to supply the information for ESMA’s review in accordance with Article 25(5). However, it is noted that the TC-CCP

should avoid being asked for the same information twice in the application procedure. As explained above, the approach ESMA intends to take with relevance to the information to be collected as part of the TC-CCP application is elaborated in the consultation paper on the RTS on information.

49. The respondents also note that ESMA should, whenever possible, use information publicly available to assess the criteria. Whilst ESMA agrees that the burden of information is crucial and would need to be managed to ensure proportionality, ESMA notes that for an application, the TC-CCP is responsible to provide the information such TC-CCP would like to be assessed and the TC-CCP is held liable for the information provided under the application as further regulated by EMIR. Those aspects limit the possibility for ESMA to identify the information in relation to the TC-CCP.
50. Some respondents stress that the information required to be provided by TC-CCPs to ESMA is extensive and is likely to include commercial and other sensitive information. One respondent raised that ESMA should be clear in its technical advice that it will hold all information received in the strictest of confidence. With respect to the first point, we refer to the consultation paper on the RTS for information to come. With reference to confidentiality, it is clear that all supervisory information collected by ESMA is subject to confidentiality in accordance with Article 83 of EMIR which is in line with Article 70 of ESMA Regulation. It should be noted that ESMA already is performing supervisory functions over other market infrastructures and entities.

4.2.3.1 Nexus

51. Some respondents underline that the regulation requires a TC-CCP's nexus to the Union or one of its Member States to be established based on its clearing activities. The responses note that while it is assumed that ESMA intends to limit its determination to where a TC-CCP is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States this is not sufficiently clear from the consultation paper. One respondent stress that it is "critical that all related indicators, and underlying considerations, clearly establishes a nexus to the Union (or lack thereof) so that importance to the stability of the EU can accordingly be determined". An outcome of assessing the indicators without a clear nexus to the Union would create a flawed result, where a TC-CCP with no systemic relevance to the Union could be designated as systemically important, due to it being captured by the indicators on a general basis. ESMA agrees that the nexus is crucial in assessing systemic importance to the Union and have endeavoured to make this clearer in the indicators' description.
52. In relation to the assessment of the nexus to the Union, several respondents underline that this nexus, for certain indicators, should be captured by a reference to Union currencies i.e. assessments should be limited to Union currencies for example where considering the currency of the cleared instruments, underlying assets, payments obligations etc. One respondent notes that ESMA's proposed indicators will impose a tiering framework where a TC-CCP that clears only U.S. Dollar (USD) denominated financial instruments with only a few EU entities and in turn, de minimis risk exposures to the Union, could in its view be

designated systemically important to the Union. The respondent suggests that “the definition of systemic risk is being tied to exposures in Union currencies and to EU domiciled financial institutions”. Another respondent though notes that whilst the Union currencies are relevant to the Union also third-country currencies may be relevant to assess a TC-CCPs systemically importance to the Union, such as USD. ESMA agrees that for certain indicators the nexus in relation to Union currencies should be clarified however it is not a determinative element, hence for some indicators or factors within the indicators other currencies may be part of the assessment where the nexus to the Union is not driven by the currency.

53. Some respondents challenge the applicability of “likely to become” systemically important as it contemplates a forward-looking analysis based on an assessment of what might or might not materialise, rendering such an exercise prone to subjective analysis that could lead to unintended results and will introduce considerable uncertainty into the process for those TC-CCPs being reviewed. ESMA has noted this concern and is envisaging to use this aspect of the assessment with caution and primarily where there is a high level of certainty as to the future. It should, however, be noted that this language comes from EMIR 2.2 and this cannot be disregarded or disapplied when developing its supplementing delegated act.

4.2.4 Granularity and format of the indicators

54. Another aspect raised in the consultation is that the indicators are broad and do not appear to be specific to assessing the systemic importance of the TC-CCP for the Union and that they are too wide and general for a TC-CCP to assess its likelihood of being deemed a Tier 2 CCP, hence conferring an unreasonable degree of discretion on ESMA, making its determination on the tiering of CCPs highly unpredictable. It is suggested by some respondents that ESMA amends the indicators to provide more detail as to what ESMA will take into account as part of its assessment (with examples of how each indicator would affect the assessment) to ensure a fair and consistent application of the criteria for tiering. ESMA has noted this concern, however, as elaborated on under the section 4.2.1.1 on “Scope of the technical advice”, this technical advice does not envisage to describe how the indicators will be assessed as this is not part of the mandate. ESMA has nevertheless, where possible, tried to provide in this technical advice guidance on the purpose of the indicators.
55. Another aspect identified by some responses is that the ESMA “may” consider certain aspects of the indicators but is required to consider “at least” the proposed indicators, implying that the proposed scope of the indicators are not binding for ESMA to use in its assessment but also that the list of indicators are non-exhaustive and that ESMA could, at its sole discretion, consider further indicators outside those specified in this technical advice and proposed delegated act. Again, the concern is that it is difficult for a TC-CCP to obtain any legal certainty due to the broad considerations that ESMA can take into account when assessing systemic risk.
56. It is correct that to assess the criteria ESMA may elect the aspects (factors) of the pre-determined indicators and ESMA may equally, though less likely, consider other aspects than the ones presented in the criteria and indicators, due to the wording “by taking into

account” and the corresponding recital states “These criteria should contribute to the overall assessment”. The intention behind referring to the indicators ESMA shall consider to the extent relevant is driven by the complexity of the assessment to be conducted by ESMA and to ensure the assessment of the indicators is the most relevant for a TC-CCP whilst, at the same time, ensuring all criteria are considered in the assessment. ESMA should therefore be able to consider the indicators or the factors of the indicators which might give a first sign of potential systemically importance of a TC-CCPs to the Union or any Member State. ESMA has therefore tried to give a first indication of what would be considered particularly relevant in the assessment. ESMA has also replaced “ESMA shall at least” with “ESMA shall consider to the extent relevant” and is thereby reducing the obligation on ESMA to assess all indicators. However, ESMA is under the obligation of EMIR to consider all criteria, hence each TC-CCP will at least provide the information ESMA requires in the application process to ensure ESMA has the information to consider each criterion, but the difference is that this may not include an assessment of all indicators. Furthermore, this discretion would significantly alleviate the burden on TC-CCPs that are less likely to be determined systemically important for the Union.

57. Some respondents note that a number of the indicators are not themselves indicative of systemic financial risk and are relevant only if assessing the operational resiliency of a TC-CCP, which arguably would be important only after ESMA has determined the systemic importance of a TC-CCP to the Union or one of its Member States. This view is not shared by ESMA nor the legislators and recital 31 explains that ESMA, where assessing the risk profile of a TC-CCP, should consider all risks. Risk aspects are clearly envisaged in Article 25(2a)(a) as part of the criteria and one reason is that a high risk combined with a high degree of interconnectedness may result in the TC-CCP being systemically important to the Union as its failure would cause severe effects in the Union due to the interconnectedness and the risk of failure may be higher due to the identified risks. It would be appropriate for such TC-CCP to comply with EMIR to ensure the risks of the TC-CCP is managed in accordance with EMIR requirements.

4.2.4.1 International standards

58. Some respondents requested that a higher degree of reliance is placed on international and global standards and that existing risk assessments and disclosures that follow the PFMLs should be determinative of a TC-CCP’s risk profile. These comments seem to be made primarily in relation to supervision or in the process of recognition rather than in relation to tiering. It is noted that the TC-CCP will provide documents referring to, for example, its risk management in the process for tiering. ESMA has not specified the documents to be provided in detail but where a TC-CCP has been assessed against international standards this will be part of the documents provided to ESMA. ESMA notes that for tiering the focus is assessing whether a TC-CCP is determined systemically important for the Union or any Member States and whilst the compliance with, for example, PFMLs might be relevant when assessing the on-going compliance with the conditions for recognition, it does not appear a determinant factor as to whether a CCP is systemic relevant for the EU.

4.3 Indicators to further assess the nature, size and complexity of the CCP

59. The first criterion to be considered by ESMA covers the nature, size and complexity of the TC-CCP's business in the Union, and outside the Union to the extent its business may have a systemic impact on the Union or on one or more of its Member States, including the value in aggregate terms or the aggregate exposure of the TC-CCP (Article 25(2a)(a) of EMIR).
60. The criterion regarding the nature, size and complexity of the TC-CCP includes two measurements, (1) the value in aggregate terms and in each Union currency of transactions cleared by the CCP, or the aggregate exposure of the CCP engaged in clearing activities to its CMs, and to the extent the information is available, their clients and indirect clients established in the Union, including if EU CMs or clients have been designated by Member States as Other Systemically Important Institutions (O-SIIs) pursuant to Article 131 of Directive 2013/36/EU, and (2) the risk profile of the TC-CCP, in terms of, amongst others, legal, operational and business risk, where operational risk is further specified in the recital such as fraud, criminal activity, IT and cyber-risk.

4.3.1 Article 1(1)(a) - Indicator 1 - to further specify the "nature, size and complexity"

61. Based on the consultation responses ESMA has amended indicator 1 to better reflect the nexus to the Union and provide clarifications.
62. ESMA expects to identify the CCP's group structure to identify the relevance of the TC-CCP to the Union or one or more of its Member States and the extent to which the CCP provides other services in addition to clearing services to determine whether such a structure, and the way the services are provided and to whom, might generate risks or otherwise have an impact on the Union or one of its Member States. This indicator will be considered to assess and further establish relevance for the Union where the TC-CCP is considered relevant to the Union or one or more of its Member States.

Indicator 1:

Assess the ownership, business and corporate structure of the CCP including assessing in detail:

- (i) the ownership structure specifying any qualifying holdings,
- (ii) other financial market infrastructures within the group to which the CCP belongs; and
- (iii) whether the CCP acts in several capacities.

4.3.2 Article 1(1)(b) - Indicator 2 - to assess the financial instruments cleared by the CCP

63. Many respondents request ESMA to further clarify the nexus to the Union in the indicators, however in relation to this indicator it was noted that not only Union currencies, but also third country currencies (e.g. USD) may be important to fully assess financial stability implications if these currencies and related products are widely used by European institutions, resulting in substantial credit exposures of those institutions to a given TC-CCP. Another point noted was the underlying assets and that it would be beneficial to include granularity on the underlying asset.

64. Based on the consultation responses ESMA has amended the indicator 2 to better reflect the nexus to the Union and to increase the granularity on underlying assets. ESMA has also deleted the two last bullet points that derived from the first criterion referring to the nature and complexity of the CCPs business as explained by recital 31 of EMIR as ESMA does not envisage they would provide relevant information for the assessment of many TC-CCPs and if and when they may be relevant, ESMA will assess the aspects relevant to the TC-CCP, hence including them as part of the standard indicator may be disproportionate. ESMA has also moved the assessment of where the TC-CCP provides or intends to provide clearing or other relevant services to Member States to this Article.
65. ESMA considers that it is important to look at the scope of the cleared products, whether the financial instruments cleared by the TC-CCP relate somehow to the Union (through currency, entity etc...) and then look at whether products cleared in other currencies might indirectly affect the Union, e.g. considerations should be given to financial instruments cleared by the CCP that are subject to the clearing obligation irrespectively of the currency. This indicator is one of the main indicators to assess the relevance of the TC-CCP to the Union.

Indicator 2:

Assess the financial instruments cleared by the CCP and the Member States where the CCP provides, or intends to provide, services specifying whether the instruments are;

- (i) subject to the clearing obligation in the Union,
- (ii) denominated in or reference a Union Currency,
- (iii) issued by an EU entity,
- (iv) commodities relevant for the Union, and/or
- (v) executed on an EU TV or OTC.

4.3.3 Article 1(1)(c) - Indicator 3 - to assess value and volume cleared by the CCP

66. A consultation response suggests that the gross/net notional outstanding amount may not be the most relevant measure to assess the value and volume of OTC derivatives cleared by a given CCP. Also, additional information is recommended on the value of turnover (e.g. the value of transactions novated over a given period of time), compression volumes, or the number of transactions of a given asset class.
67. The respondents further note that while the indicators are informative in terms of the impact of the TC-CCP to the Union as a whole, perhaps additional granularity could be beneficial to assess the impact on individual Member States and this should apply not only to EU clients of EU CMs but should also include EU clients (and where possible indirect clients) of non-EU CMs. Also, it was suggested to include in the indicators a measure of the market share of the TC-CCP in each class or sub-class of financial instruments it clears, compared with the Union CCPs and other third-country CCPs.
68. Based on the consultation responses ESMA has amended indicator 3 for example to accommodate for the comment on value and to make the difference between volume and positions clearer. In relation to turnover and compression, ESMA decided not to include further granularity in the indicator to avoid excessive burdens on TC-CCPs. ESMA has noted and accommodated the suggestion to provide further granularity at Member State

level, and both this indicator and indicator 10 have been clarified that the identity is also to be provided for clients and indirect clients. In relation to including a measure of the market share, this may be relevant in relation to the assessment conducted by ESMA of the indicators but is not part of the indicator.

69. ESMA considers that these quantitative measurements are necessary to establish both the scope of the TC-CCPs' business and the degree of the nexus to the Union. Hence, this indicator is one of the main indicators to assess the relevance of the TC-CCP to the Union however, as its assessment requires identified CMs this indicator will be considered once confirmed the TC-CCP has EU CMs, EU clients or EU indirect clients under Article 3(1)(a)/Indicator 10.

Indicator 3:

Assess the value and volume cleared by the CCP;

(i) at the level of the CCP;

(ii) at the level of each EU CM;

(iii) at the level of EU clients and EU indirect clients, where possible; and

(iv) at the level of non-EU CMs where such CM clear on behalf of EU clients and EU indirect clients.

4.3.4 Article 1(1)(d) - Indicator 4 – to assess the transparency and liquidity of the relevant markets

70. Very few respondents provide comments on this indicator, and one comment was to clarify the scope of “market”. This indicator derives from the recital where to “In specifying those criteria, [...] as well as the transparency and liquidity of the markets concerned” and is aiming to get a better understanding of the market the TC-CCP operates in as, where there is a nexus to the Union, the scope and resilience of the market and the regulatory landscape on transparency and liquidity is considered. Hence, the relevance of this indicator in the process of determining tiering will depend on the outcome of the assessment of other indicators. This indicator will be considered to assess and further determine relevance for the Union or one or more of its Member States where the TC-CCP is considered relevant to the Union or one or more of its Member States.

Indicator 4:

Assess the transparency and liquidity of the relevant markets.

4.3.5 Article 1(1)(e) - Indicator 5 - to assess the risk profile of the CCP

71. By performing centralised activities, a CCP concentrates risks and one of the relevant risks is systemic risk including legal, credit, liquidity, general business, custody, investment and operational risks that contribute to the definition of the risk profile of the CCP and its systemic relevance. To assess the risk profile of the TC-CCP, and in order to establish the extent to which the TC-CCP's risk profile may have a systemic impact on the Union or on one or more of its Member States, ESMA should, as specified in EMIR, consider all risks, including legal risks, business risks and operational risks, such as fraud, criminal activity, IT and cyber-risk.

72. To assess those risks ESMA may consider international and other well-established guidelines and principles, including the risks listed in Chapter 2 of the *Overview of key risks in financial market infrastructures* (PFMIs⁸). ESMA may, in its assessment of operational risks on fraud, criminal activity, IT and cyber-risks, consider any guidelines or principles established by international institutions, including the *Guidance on cyber resilience for financial market infrastructures*⁹ supplemental to the PFMIs.
73. The responses to the consultation suggest that the risk profile of the TC-CCP is not a relevant criterion to use in assessing the systemically importance of a TC-CC. Additionally, some respondents noted that any assessment of a TC-CCP's broader risk profile, including cyber-risks, becomes relevant to the stability of the Union where the TC-CCP has exposures to EU financial instruments and/or EU market participants and as such, such exposures should be the trigger for the assessment of its broader risk profile.
74. Some respondents are referring to the TC-CCPs adherence to the PFMIs as adopted and applied and that PFMIs sets out internationally agreed standards for CCP risk management practices, including those related to cyber risks. It is argued that where ESMA conducts a broader risk analysis for a TC-CCP, a determination that the CCP adheres to the PFMIs as adopted by its local regulator should be sufficient, since the PFMIs address the risks to which a CCP is subject, including cyber risk.
75. ESMA has carefully considered the comments provided and, based on the consultation responses, ESMA has amended the indicator 5. ESMA generally agrees with the view that risk is connected to the nexus to the Union and due to this ESMA envisages to assess the risk of a TC-CCP once a nexus to the Union is established. However, ESMA does not share the view that risk is only relevant for supervision and considers the risk of the TC-CCP is an important factor to consider as part of its tiering assessment once nexus is established. Article 25(2a) refers to risk as part of the criteria and should therefore be assessed as none of the criteria can be excluded from ESMA assessment however, this criterion also contains the indicators 1-3 which are focusing on establishing the relevance of the TC-CCP to the Union. In relation to the comments on PFMIs, ESMA refers to the part on "International standards".
76. In the responses to the consultation paper it is also noted that some respondents are very concerned with cyber risk, which is seen as a fundamental risk aspect in the CCP business and all along the chain of intermediaries and that the consideration of cyber risks is valid in relation to TC-CCPs that are in fact systemically important. ESMA should assess the extent to which any TC-CCP is able to protect itself from cyber risks and prevent such risks being introduced through its users and service providers. One respondent notes that with respect to the assessment of cyber-risks, ESMA could assess, based on information provided by the TC-CCP, whether and how the TC-CCP has taken steps to implement the CPMI-IOSCO *Guidance on cyber resilience for financial market infrastructures*.

⁸ <https://www.bis.org/cpmi/publ/d101.htm>

⁹ <https://www.bis.org/cpmi/publ/d146.pdf>

77. Against this background, ESMA does not envisage any amendments to the criteria as drafted in a descriptive manner to ensure the indicator is inclusive enough to capture the aspects relevant to the TC-CCP. ESMA again notes that the assessment of the risk of the TC-CCP in relation to cyber risks is depending on establishing a nexus and ESMA envisages to assess this indicator to identify risks (if any) that could have an impact on the Union or any of its Member States, for example a failure to have sufficient cybersecurity, where this could result in severe breaches of confidentiality or malfunctions of management systems and where this, due to nexus, would have an impact the Union or one or more of its Union Member States. Hence, this indicator will be considered to assess and further determine relevance for the Union where the TC-CCP is considered relevant to the Union or one or more of its Member States.

Indicator 5:
Assess the risk profile of the CCP.

4.4 Indicators to further assess the effect of a failure or disruption of the CCP

78. The second criterion to be considered by ESMA covers the effect which a failure or disruption would have on (i) financial markets, including the liquidity of the markets served; (ii) financial institutions; (iii) the broader financial system; or (iv) on the financial stability of the Union or of one or more of its Member States (Article 25(2a)(b)). ESMA received broad support for the indicators, however a few detailed comments were provided on the indicators and some of the suggestions or comments provided in relation to the consultation paper are presented below. There are a few respondents that disagree with the indicators presented, primarily based on the broad nature of the indicators and the fact that the indicators fail to establish a clear nexus to the Union.

79. ESMA disagrees with this conclusion and notes that the indicators already refer to Union currencies and EU CMs, however ESMA is making changes to improve clarity on the nexus where justified.

4.4.1 Article 2(1)(a) - Indicator 6 - to assess the margins, default fund contributions and eligible collateral

80. There is a general support for this indicator. It is suggested that in addition to the amount of collateral denominated in Union currencies and/or collateral related to EU entities that are held by the TC-CCP, ESMA should also include an evaluation of the protections for which such collateral is subject as it is important to consider the manner in which such collateral is protected as the potential impact to stability would depend on the level of protections of the collateral it holds— e.g., collateral being bankruptcy remote.

81. Based on the consultation responses ESMA has amended indicator 6 to accommodate for the comment on protection of collateral and the nexus to Union. This indicator is one of the main indicators to assess the relevance of the TC-CCP to the Union, i.e. the nexus, based in principle on the scope of collateral in Union currencies, where the collateral held are



securities issued by EU entities or where the collateral is otherwise provided by EU entities. Other factors of this indicator require CMs to have been identified hence will be considered once confirmed that the TC-CCP has EU CMs, EU clients or EU indirect clients under Article 3(1)(a)/Indicator 10.

Indicator 6:
Assess the margins, default fund contributions and eligible collateral.

4.4.2 Article 2(1)(b) - Indicator 7 - to assess the resources and liquidity resources

82. There is support for this indicator in the responses, however in the responses to the consultation the respondents note that this indicator should clearly consider a TC-CCP's potential payment obligations denominated in Union currencies and related liquidity resources, as well as where liquidity providers are domiciled in the Union.
83. ESMA agrees and have made some amendments to reflect the comments received. Again, this indicator is one of the main indicators and in particular some of the factors within the indicator will be assessed by ESMA to assess the relevance of the TC-CCP for the Union however, where the assessment requires identified CMs such aspects of the indicator will be considered once confirmed that the TC-CCP has EU CMs, EU clients or EU indirect clients under Article 3(1)(a)/Indicator 10.

Indicator 7:
Assess committed/uncommitted resources and liquidity resources.

4.4.3 Article 2(1)(c) - Indicator 8 - to assess the settlement and payments

84. There is support for this indicator in the responses. One respondent suggests, as an alternative indicator, that ESMA would view the share of a TC-CCP's flow in the EU RTGS systems (directly or indirectly). Other respondents note that the reference to DLT should be used with caution and for ESMA not to specify these technologies more granularly as there is a significant misuse and abuse of jargon in the DLT/ blockchain space.
85. In the responses to the consultation paper the reliance on adherence on PFMI is suggested sufficient to evaluate the TC-CCP's settlement and payments practices and a TC-CCP's local regulator would consider technology related risks in its local adoption and application of the PFMI.
86. Based on the consultation responses ESMA has amended the indicator 8 to accommodate for settlement and payment obligations and to include a reference to EU RTGS settlement whilst deleting the reference to DLT to avoid uncertainties and noting cyber risk is covered by indicator 5. In relation to the comments on PFMI, ESMA refers to the section on "International standards" above noting that whilst the compliance with, for example, PFMI might be relevant when assessing the on-going compliance with the conditions for recognition, it does not appear a determinant factor as to whether a TC-CCP is systemic relevant for the Union. This indicator will be considered to assess and further establish

relevance for the Union where the TC-CCP is considered relevant to the Union or one or more of its Member States.

Indicator 8:
Assess settlement and payments, including the use of central bank money for settlement.

4.4.4 Article 2(1)(d) - Indicator 9 - to assess recovery and resolution

87. There is a general support for this indicator in the responses, but the indicators also receive some opposing views where one respondent suggests the indicators should be removed on the basis that this indicator is redundant whilst another respondent states that this indicator, considering the framework for recovery and resolution, is the one of the main indicators.
88. It is generally noted that the Union and some other jurisdictions do not have a finalised recovery and resolution framework adopted and that there is international work on recovery and resolution planning ongoing. Consequently, ESMA is encouraged to take a proportionate and outcome-based approach to the assessment of this indicator rather than an assessment focusing on individual tools or powers at a granular level.
89. Once nexus is identified some respondents suggest that where a TC-CCP adheres to the PFMI as adopted by its local regulator, this should be relied upon as the PFMI specifically address the requirement for a CCP to have practices in place to address recovery and orderly wind-down (i.e., resolution) scenarios, including that a TC-CCP has appropriate plans to address scenarios that could potentially prevent it from being able to provide its critical services.
90. In relation to PFMI it is important to assess the effects of the framework and based on the consultation responses ESMA has amended indicator 9 to not only refer to the framework the CCP is subject to, but also that such a framework is PFMI compliant.
91. ESMA, as per the previous indicator, notes that whilst the compliance with, for example, PFMI might be relevant when assessing the on-going compliance with the conditions for recognition, it does not appear a determinant factor as to whether a TC-CCP is systemic relevant for the Union. Hence, whilst the factors used to consider recovery and resolution under the PFMI are similar to the factors considered by ESMA in this indicator, the assessment of the factors is part of the assessment and the actual adherence to the PFMI cannot be used as the sole assessment in the determination of systemic importance as this is a different assessment to be had by ESMA. The relevance of this indicator in the process of determining tiering will likely depend on the outcome of the assessment of other indicators and in particular its assessment requires identified CMs hence will be considered where concluded the TC-CCP has EU CMs, EU clients or EU indirect clients under Article 3(1)(a)/Indicator 10.

Indicator 9:
Assess the framework for recovery and resolution.

4.5 Indicators to further assess the CCP's clearing membership structure

92. The third criterion to be considered by ESMA covers the TC-CCP's clearing membership structure, considering the direct memberships and to the extent information is available on the structure of its clearing members' network of clients and indirect clients, in particular the proportion of its CMs and their EU clients and EU indirect clients (Article 25(2a)(c) EMIR).

4.5.1 Article 3(1)(a) - Indicator 10 - to assess the identity of CMs

93. There is a general support for this indicator in the responses except for three main aspects; (i) the first one is that the assessment should be based solely on a TC-CCP's CMs domiciled in the Union as these CMs have direct exposure to the TC-CCP due to the default fund contribution, (ii) the second one is the lack of nexus to the Union under the indicator and the underlying considerations, which is considered inconsistent with EMIR 2.2 and (iii) the third one is that this indicator is not relevant for the assessment of systemic risk to the Union or one of its Member States.

94. The respondents note that non-EU entities which form part of an EU-headquartered groups present a higher level of interconnectedness with the Union than non-EU entities which form part of non-EU-headquartered groups, and they should therefore not be treated equally to EU-established entities from a systemic risk perspective. Treating them in this way obscures the fact that their connection to the Union is of a more remote character. One notes that "identities and memberships" of CMs of a TC-CCP not domiciled in the Union are immaterial to the stability of the Union since they are located outside of the Union's economic and financial bloc.

95. Certain aspects of indicator 10 are noted to be very similar to indicator 3, both of which require information to be provided on EU CMs and non-EU CMs. Hence, 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.

96. In addition to the criteria and processes to grant or deny clearing membership, ESMA could also consider the procedures, notice periods, timeline and discretion by the TC-CCP to terminate membership in various cases, including (i) failure to meet payment, settlement and margin obligations, (ii) failure to meet other participation criteria (e.g. credit rating), (iii) other reasons not related to risk management (e.g. commercial reasons). This would allow ESMA to assess the objectivity of these processes and their manageability from the perspective of EU CMs.

97. Based on the consultation responses ESMA has amended the indicator 10 to accommodate for some of the comments received. ESMA notes the request for nexus to be clarified but disagrees to limit the information under this indicator to only EU CM without understanding their weight on the overall activity of the CCP. ESMA also disagrees with the argument that by referring to EU CMs and EU clients and EU-indirect clients indifferently obscures the fact that some EU clients and EU indirect clients' connection to the EU is of a

more remote character. ESMA notes that whilst EU CM, EU clients and EU indirect clients (and EU clients and EU indirect clients may be clearing through a non-EU CM), do have different connection to the Union, the assessment will consider the actual impact the different clearing members or clients/indirect clients may have on the Union and this will be part of the assessment.

98. ESMA will keep both indicators 3 and 10 as the assessment is different, indicator 3 is a quantitative assessment and indicator 10 is on general information as to the identity of CMs/EU clients and EU indirect clients to assess nexus to the Union. ESMA took note of the requests to further specify the nexus and whilst ESMA agrees with limiting the assessment to CMs with a nexus to the Union, ESMA also notes: (i) that to consider the relevance of EU CMs, EU clients and EU indirect clients, their share of the CCP total activity is needed; and (ii) the nexus to the Union is not exclusively provided by the location of the CM in the Union, but also by the group to which it is part of. ESMA notes that a similar approach is adopted by US authorities when referring to a US person. In relation to the request for further granularity, ESMA considers the main points covered by the indicators, see for example indicator 11 covering access to clearing services and in order to respect the limitation of the indicators ESMA has not included additional aspects in the indicators.
99. ESMA expects in this indicator to further identify the CMs including where such CMs are EU CMs, EU clients or EU indirect clients and to assess the extent to which such entities are linked to the Union or one or more of its Union Member States and, where possible, the distribution of CMs on Member States. Hence, this is one of the main indicators to assess the relevance of the TC-CCP to the Union.

Indicator 10:

Assess and identify the CMs, and in particular EU CMs, EU clients and EU indirect clients.

4.5.2 Article 3(1)(b) - Indicator 11 – to assess access to clearing service

100. There is a general support for this indicator in the responses except for respondents suggesting that the indicator should be removed due to overlapping with indicator 10 and another stating that indicator 11 is not relevant to the assessment of systemic financial risk to the Union or one of its Member States. Some responses note the lack of nexus to the Union.
101. ESMA has not amended the indicator 11. ESMA does not agree with the necessity to establish nexus to the Union for this indicator as the access to clearing services should be the same for all market actors. The purpose here is to get a good understanding of how CMs may access the TC-CCP and the level of financial commitment with the different options as this will be part of the assessment on the different risk levels of the TC-CCP and its accessibility. The relevance of this indicator, in the process of determining tiering, will likely depend on whether the TC-CCP clears financial instruments with a relevance for the Union or one or more of its Member States (Article 1(1)(b)).

Indicator 11:

Assess access to the CCP and to the clearing services provided by the CCP.

4.6 Indicator to further assess alternative clearing services

102. This fourth criterion to be considered by ESMA is to what extent alternative clearing services, substitutes, exist in financial instruments denominated in Union currencies to CMs, and to what extent the information is available to their clients and indirect clients established in the Union (Article 25 (2a)(d) EMIR).
103. ESMA has to assess the availability of alternative clearing services in each EU currency, i.e. where other CCPs provide clearing services covering the same or equivalent financial instruments as the TC-CCP.
104. ESMA considers that this criterion is fairly straightforward and therefore only one indicator is used to assist ESMA in its assessment.

4.6.1 Article 4(1) - Indicator 12 - to assess substitutes

105. There is general support for this indicator in the responses except for one respondent that does not believe the assessment of alternative clearing services would in itself be a valid indicator for the existence or presence of systemic risk. One respondent notes that ESMA should consider not only if these clearing services are authorised or recognised in the Union, but also whether EU market participants already participate in these clearing services and the extent to which they are actually used by EU market participants.
106. Other suggestions include that the indicator could also be usefully complemented with a comparison of the respective market shares, both among EU counterparties and globally, of the third-country CCP and the alternative EU CCPs authorised to clear the same financial instruments and, to the extent that information is available, ESMA should also assess the capacity of alternative clearing services to take up larger volumes of clearing activities, should that be necessary, without disruption to financial markets.
107. Another respondent notes that the availability of alternative clearing services for a TC-CCP's clearing of financial instruments denominated in Union currencies should focus on where such instruments are being used to manage material amounts of risk by EU market participants. If such instruments are not cleared by EU market participants, the availability of alternative clearing services is immaterial to determining a TC-CCP's systemic importance to the stability of the Union or one of its Member States.
108. One respondent suggests that a clear distinction is made between products; OTC derivatives versus ETD. For OTC derivatives it might be warranted to assess substitutes to clearing services. However, assessment for substitutes for ETDs will be impossible and should therefore be excluded. According to this respondent ETDs are unique products designed by exchanges and only traded on that exchange and cleared by the clearing house selected by the exchange. Hence there is no substitute available for ETD clearing.
109. Based on the consultation responses ESMA has amended indicator 12 to accommodate for the request for nexus to the Union to be clarified, however many of the suggestions relate to the assessment of the indicator rather than the indicator itself and



ESMA will not change its approach in view of those comments. In relation to the suggestion to limit the substitutability to only OTC, ESMA would disagree to insert such limitation as whilst it is true that many ETDs are not fully fungible, there may be similar products allowing to hedge risks in the same manner. This indicator will be considered as one of the main indicators to assess and establish relevance for the Union.

Indicator 12:
Assess substitutes to the CCP clearing service.

4.7 Indicators to further assess relationships, interdependencies, or other interactions

110. The fifth criterion to be considered by ESMA covers the TC-CCP's relationship, interdependencies, or other interactions with other financial market infrastructures, other financial institutions and the broader financial system. The criterion is qualified by the requirement that such relationships or interdependencies have to be considered to the extent that this is likely to have an impact on the financial stability of the Union or one of its Member States (Article 25 (2a)(e) EMIR).

4.7.1 Article 5(1)(a) - Indicator 13 - to assess outsourcing arrangements

111. There is a general support for this indicator in the responses however, there is a question raised as to the indicators' relevance to the assessment of systemic risk to the Union or one of its Member States. It is also noted that if the reference is not to the CCPs' clearing services but to other services that have been outsourced to a third-country CCP, these should, by definition, be "non-core" or ancillary to the CCPs' key functions. In those circumstances, it would seem unlikely that such services would have a significant impact on an EU entity if they were unavailable and, consequently, the correlation to systemic risk appears to be weak.

112. Outsourcing of certain activities in itself should not be an indicator of the systemic importance of a TC-CCP, provided those outsourcing arrangements are managed by the CCP in accordance with the requirements of EMIR or equivalent requirements in a third country. Also, there is a risk if ESMA considers that a direct connection by TC-CCPs to EU FMIs implies an increased level of risk to the Union, then TC-CCPs may be incentivised to connect indirectly, which could in practice increase the risk.

113. Outsourcing practices have an impact not only when they involve EU providers. Certain types of services outsourced from entities located in third-countries may also pose a substantial risk (e.g. operational risk) to the TC-CCP. For example, the outsourcing of critical or sensitive functions in the context of data confidentiality could represent a substantial risk to the Union.

114. Based on the consultation responses ESMA has amended indicator 13 however many of the suggestions relate to the assessment of the indicator rather than the indicator and ESMA does consider it appropriate to amend its proposal to reflect those comments. In relation to the suggestion to include services outsourced to the CCP from entities other

than EU entities, ESMA has not amended the indicator due to the request from the respondents to focus on the nexus to the Union, but ESMA agrees that also other outsourcing arrangements could be relevant. This indicator will be considered to assess and further establish relevance for the Union, where the TC-CCP is considered relevant to the Union or one or more of its Member States.

Indicator 13:
Assess outsourcing arrangements.

4.7.2 Article 5(1)(b) - Indicator 14 - to assess links or connections with other financial market infrastructure (FMIs)

115. There is a support for this indicator in the responses however, some respondents note that direct connections to a central securities depository (“CSD”) or payment systems should not necessarily be perceived by ESMA as a potential risk to the stability of Union that could lead to a higher tiering as this could incentivise a TC-CCP to use more risky indirect links.
116. Some respondents indicate that when considering the extent to which the CCP has interoperability arrangements and/or cross-margining agreements with EU CCPs, or links with or participation in other financial market infrastructures located in the Union, such as central securities depositories (CSDs) or payment systems, it would be useful to know the extent to which the arrangements are used to clear or settle financial instruments denominated in their respective Union currency.
117. Information on the existence of links with other CCPs, either direct (interoperability, cross-margining agreements), or through common clearing members would improve the assessment.
118. Based on the consultation responses ESMA has amended the indicator 14 to include information on the volume and value of transactions cleared or settled by the CCP in Union currencies through these arrangements. ESMA considers that to extend information to cover links through CMs maybe interesting but may be against the principle of proportionality.
119. ESMA notes that this is one of the main indicators to assess the nexus and relevance of the TC-CCP to the Union or to one or more if its Member States.

Indicator 14:
Assess the links or connections with other financial market infrastructures, other financial institutions and the broader financial system.



5 Annexes

5.1 Annex 1 Mandate to provide technical advice

ESMA received a provisional mandate on 3 May 2019 to provide technical advice for the development of the corresponding Delegated Act, on the basis of which ESMA ran a consultation, and on 30 October 2019 the mandate was confirmed.

PROVISIONAL REQUEST TO THE EUROPEAN SECURITIES AND MARKETS
AUTHORITY (ESMA) FOR TECHNICAL ADVICE ON A POSSIBLE DELEGATED ACT
CONCERNING THE CRITERIA TO BE TAKEN INTO ACCOUNT BY ESMA WHEN
ASSESSING THE SYSTEMIC NATURE OF THIRD-COUNTRY CENTRAL
COUNTERPARTIES (CCPs)

With this provisional mandate the Commission seeks ESMA's technical advice on a possible delegated act concerning the European Market Infrastructure Regulation (EMIR) as amended by the 2019 CCP Supervision Regulation (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"), and the Framework Agreement on Relations between the European Parliament and the European Commission (the "Framework Agreement").

According to Article 25(2a) of the Regulation as amended and with regard to the criteria ESMA must take into account when determining the systemic importance of a third-country CCP, the Commission shall adopt a delegated act to further specify these criteria.

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, the Commission will continue, as appropriate, to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

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

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

1. Context

1.1 Scope

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

The Regulation as amended will strengthen the framework for the supervision of Union and third-country CCPs that provide clearing services to EU clearing members or trading venues. This is to address the increasing concentration of risk in these infrastructures and the significant proportion of financial instruments denominated in Union currencies that are cleared outside the Union, including as a result of the expected withdrawal of the UK from the Union. The objective of the Regulation as amended is to reinforce the overall stability of the Union 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, such 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 systematically 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 a CCP can only be recognised and permitted to provide clearing services or activities in the Union if it meets specific conditions. 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 25(2a) of the Regulation as amended, ESMA will be empowered, in the process of recognising a third-country CCP or reviewing an existing recognition, to determine, in consultation with the ESRB and relevant central banks of issue of the Union, whether a CCP is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States. In assessing the systemic importance of third-country CCPs ESMA shall take into account a list of high-level criteria that need to be further specified in a Commission delegated act.

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")¹⁰, 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

¹⁰ 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.

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.

- In accordance with the first sub-paragraph of Article 25(2a) of the Regulation as amended, which requires ESMA to consult the European Systemic Risk Board and European Central Banks of Issue in the tiering process, ESMA may assess whether it is appropriate to seek their views in the preparation of its advice.

- In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants in an open and transparent manner and take into account the resulting opinions in its advice. ESMA should provide a detailed feedback statement on the consultation, specifying when consultations took place, how many responses were received and from whom, as well as the main arguments for and against the issues raised. This feedback statement should be annexed to its technical advice. The technical advice should justify ESMA's choices vis-à-vis the main arguments raised during the consultation.

- ESMA is invited to justify its advice by providing a quantitative and qualitative cost-benefit analysis of all the options considered and proposed. ESMA should provide the Commission with a description of the problem, the objectives of the technical advice, possible options for consideration and a comparison of the main arguments for and against the considered options. The cost-benefit analysis should justify ESMA's choices vis-à-vis the main considered options.

- ESMA's technical advice should not take the form of a legal text. However, ESMA should provide the Commission with a clear and structured ("articulated") text, accompanied by sufficient and detailed explanations. Furthermore, the technical advice should be presented in an easily understandable language respecting current terminology in the Union.

- ESMA should provide comprehensive technical analysis on the subject matters described in section 3 below, where these are covered by the delegated powers included in:

- o the relevant provision of the Regulation as amended;
- o the corresponding recitals, or;
- o the relevant Commission's request included in this mandate.

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

2 Procedure

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

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

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

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

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

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

The Regulation as amended requires the Commission to adopt a delegated act further specifying the criteria to be taken into account by ESMA when determining the systemic importance for the Union or one or more of its Member States of a third-country CCP. These criteria are the following:

- a) the nature, size and complexity of the CCP's business in the Union, and outside the Union to the extent its business may have a systemic impact on the Union or on one or more of its Member States, including: (i) the value in aggregate terms and in each Union currency of transactions cleared by the CCP, or the aggregate exposure of the CCP engaged in clearing activities to its clearing members, and to the extent the information is available, their clients and indirect clients established in the Union, including where they have been designated by Member States as Other Systemically Important Institutions (O-SIIs) pursuant to Article 131(3) of Directive 2013/36/EU, and; (ii) the risk profile of the CCP, in terms of, amongst others, legal, operational and business risk;
- b) the effect that the failure of or a disruption to the CCP would have on: (i) financial markets, including the liquidity of the markets served; (ii) financial institutions; (iii) the broader financial system; or (iv) on the financial stability of the Union or of one or more of its Member States;
- c) the CCP's clearing membership structure including, to the extent the information is available, the structure of its clearing members' network of clients and indirect clients, established in the Union;

d) the extent to which alternative clearing services provided by other CCPs exist in financial instruments denominated in Union currencies for clearing members, and to the extent the information is available, their clients and indirect clients established in the Union;

e) the CCP's relationship, interdependencies, or other interactions with other financial market infrastructures, other financial institutions and the broader financial system to the extent that this is likely to impact on the financial stability of the Union or one of its Member States.

In its technical advice specifying those criteria, ESMA should consider the nature of the transactions cleared by the CCP, including their complexity, price volatility and average maturity, as well as the transparency and liquidity of the markets concerned and the degree to which the CCP's clearing activities are denominated in Euro or other Union currencies. In this regard, specific features concerning certain agricultural derivative contracts listed and executed on regulated markets in third countries, which relate to markets that largely serve domestic non-financial counterparties in that third country who manage their commercial risks through those contracts, may pose a negligible risk to clearing members and trading venues in the Union as they have a low degree of systemic interconnectedness with the rest of the financial system. Where a framework for the recovery and resolution of CCPs is in force in a third country, that should also be taken into account by ESMA in its analysis of the degree of systemic risk that the applicant CCP established in that third country presents to the financial stability of the Union or of one or more of its Member States.

ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act further specifying the tiering criteria, and more specifically establishing a set of indicators to be assessed to conduct the tiering process as well as the information necessary to build these indicators. These indicators shall incorporate components of a qualitative and quantitative nature.

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, it is of the utmost 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.



5.1 Annex II Cost-benefit analysis

1. Introduction

Pursuant to the second subparagraph of Article 25(2a) EMIR the Commission has to adopt a delegated act to further specify the criteria and the Commission shall endeavour to consult ESMA before adopting such a delegated act.

Accordingly, on 3 May 2019, ESMA received a provisional request from the Commission for technical advice on a possible delegated act concerning the criteria to be taken into account by ESMA when assessing the systemic nature of TC-CCPs to be adopted by the Commission pursuant to the second subparagraph of Article 25(2a) of EMIR. The mandate is enclosed in Annex I in this paper. The Commission requests that ESMA deliver their respective advices by Q3 2019.

ESMA has therefore been requested, in addition to the technical advice on the content of the delegated act, to justify their advice by providing a quantitative and qualitative cost-benefit analysis of all the options considered and proposed. This should include identification of the policy options available and an assessment of the costs and benefits. The results of this assessment should be submitted at the same time as the advice.

In carrying out a cost benefit analysis on the technical advice to the Commission on the proposed delegated act it should be noted that:

- The main policy decisions have already been taken under the primary legislation (EMIR 2.2) and the impact of such policy decisions have already been analysed and published by the Commission¹¹;
- ESMA does not have the power to deviate from its specific mandate provided by the Commission.
- ESMA policy choices should be of a pure technical nature and not contain issues of a political nature;
- In most circumstances ESMA's policy options are limited to the approach it takes on drafting the technical advice to Commission in accordance with the mandate.

2. Background

Under the second subparagraph of article 25(2a) of EMIR, the Commission is mandated to adopt a delegated act on how to *further specify the criteria* under Article 25(a) of EMIR and ESMA has been provisionally mandated to develop and submit to the Commission a technical advice on how to further specify the criteria.

¹¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017SC0246&from=GA>



ESMA proposes a set of indicators that will further specify the criteria used to assess if a TC-CCP is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States. The set of criteria spans over a wide range of considerations and are a combination of qualitative and quantitative components, this is reflected in the indicators. ESMA shall take “into account all” of the criteria. Hence the indicators are to be used as tools in the assessment of a TC-CCP and ESMA envisages that at least one indicator should cover each one of the criteria. Each indicator is therefore “mapped” against a criterion.

The consequence of ESMA determining a TC-CCP to be a Tier 2 CCP is that that such CCP can only be recognised and permitted to provide clearing services or activities in the Union if it meets additional conditions.

3. Policy Options

Considering the mandate to ESMA which is to further specify the criteria under Article 25(a) of EMIR, the only variable on which ESMA can apply and thus the actual policy option is to set the right level of granularity and quantity of the indicators used to further specify the criteria.

4. Consultation responses

There is a very broad support for policy option 3 and that it incorporates the principle of proportionality.

One respondent does not agree with the cost and benefit analysis conducted by ESMA as due to the lack of information included in the cost-benefit analysis, as the respondent has been unable to undertake a meaningful assessment of the analysis. The same respondent notes the lack of quantifiable data in the analysis and further notes that ESMA’s proposals are inconsistent with the needs of global financial markets and thus, could have significant global costs, as it could lead to wider bid-ask spreads and greater volatility. The respondent concludes that by preventing CCPs, in conjunction with their local regulators, from adopting practices that enable them to best manage the unique risks associated with their domestic markets, ESMA’s proposals may weaken the stability of the global financial system, especially in emergency or stressed circumstances.

ESMA notes that it is very difficult to assess the actual costs and that the requirement to tier TC-CCPs is a requirement under EMIR, hence a requirement for recognition under EMIR. ESMA has focused on balancing the need for a flexible and relevant framework for tiering against the cost for the TC-CCP to provide information to ESMA for the tiering. This final advice has further recalibrated this balance as the respondents on one hand support a range of indicators to apply to avoid a “one size fits all” assessment and to align the advice with the regulation, but on the other hand consider the scope of information to assess the indicators unproportionate and too burdensome for a many TC-CCPs. The respondents suggest identifying a “two-step” or tiered approach or relevance based approach to mitigate the information collection and limit the application of indicators where suitable.

ESMA does however not agree with the comment raised on the lack of analysis as to global costs as the current technical advice is focused on identifying the relevant indicators and the



costs in relation to the effects of being determined a tier 2 and subject to the corresponding recognition condition is not within the scope of this technical advice.

As mentioned above, a few respondents support a flexible approach to tiering, based on a consideration of all the criteria collectively and taking into account broader regulatory outcomes. Some welcome ESMA's clear statement and commitment to Recital 31 that "These criteria [indicators] should contribute to the overall assessment and individually, where none of these criteria should be considered determinative on its own." One respondent notes that a single indicator in itself cannot be a determining factor for the degree of systemic risk of TC-CCP to the Union or one of its Member States. One respondent states that it strongly believes that a one-size-fits-all approach is, by and large, counterproductive. For this reason, proportionality should be the guiding principle underpinning the criteria employed in reaching tiering decisions and it is noted that proportionality is the key to ensure that it is appropriate for TC-CCPs of all size, and that smaller TC-CCPs are not disincentivised from providing clearing services in the Union.

The respondents also suggest different actions to ease the regulatory burden on TC-CCP by referring to concepts such as tiering the information request and introducing priority of the indicators. One respondent notes that although EMIR provides that ESMA must consider all criteria, it does not specify how ESMA should do so. As such, they 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. It was suggested primarily focus on structuring the indicators in a way as to provide for priority and non-priority factors, with objective standards used and examples provided.

ESMA is supportive of these comments and has carefully considered the different approaches presented in the responses in order to find a proportionate approach in the process of conducting the tiering assessment. ESMA has in this final technical advice adjusted the indicators and its assessment to accommodate the concerns raised.

Some respondents note that while they support policy option 3, the information required to be provided is too granular and, in some cases, would be disproportionate for non-systemically important CCPs to provide. One respondent mentions that further clarity and quantifiable metrics may enable TC-CCPs to determine whether there is a solid business case before making an application and, if so, prepare themselves for the change in regime.

ESMA has duly noted this concern and is considering how to approach the level of information in the RTS on Information (see Section on "Information").

Based on above, ESMA sees no reason to amend the cost and benefit analysis as the principles and the elected policy option 3 is supported by the respondents.

5. Cost benefit analysis

Below is detailed the different corresponding policy options on how to further specify the criteria and the cost and benefit impacts of each of the options. One policy option considered was to establish a two-tier assessment model, envisaging additional indicators to apply if certain "core

indicators” were triggered. However, there is a risk that this option would not meet the requirement in EMIR to take into account all criteria therefore this option may result in a too limited assessment and therefore was deemed not compatible with EMIR. Hence this option was not considered a policy option and not included in the list below.

Specific objective	Ensuring that a TC-CCP that is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States is identified in accordance with the procedure as set out in Article 25(2a) of EMIR as a Tier 2 CCP.
Policy option 1	To further specify the criteria by <i>establishing a complete set of indicators each containing a granular list of aspects to be covered by each indicator.</i>
How would this option achieve the objective?	This option would provide ESMA with a very extensive set of data for ESMA to assess.
Policy option 2	To further specify the criteria by establishing <i>fewer indicators covering a more limited set of aspects</i> as indicators.
How would this option achieve the objective?	This option would provide less indicators but would still have to ensure all criteria are further specified through at least an indicator. Further, if a bare minimum of indicators are used, there is a risk of manipulation and, due to the diversity of CCPs and their activities, of missing one or more indicators to capture a relevant CCP.
Policy option 3	To further specify the criteria by establishing <i>a complete set of “principle based” indicators</i> each aimed to establish a relevant data collection from the CCP at hand in order to achieve the objective of the indicator.
How would this option achieve the objective?	This option would provide ESMA with the ability to conduct a complete data collection based on the CCP’s activity to assess the indicators.
Which policy option is the preferred one?	Policy option 3, given that option 1 would risk an unproportionate high application of indicators to all TC-CCPs and option 2 would not allow to capture all the relevant data and may result in a too limited assessment. Policy 3 would be the most appropriate and proportionate approach to further specify the criteria without being too granular but without losing relevant data for the assessment.
Is the policy chosen within the sole responsibility of ESMA? If not, what	ESMA is only providing a technical advice to the Commission which has the liability to define which option to choose for its Delegated Act.

other body is concerned / needs to be informed or consulted?	
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Impacts of the proposed policies:	
Policy option 1	
Benefits	It will ensure a full set of data to be provided to ESMA and a detailed analysis to ensure a limited yet relevant number of CCPs are defined as systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States.
Regulator's costs	The costs for regulators will be higher for this option than the other options considering the large amount of data to be assessed but the cost of tiering is foreseen to be covered by the supervisory fees.
Compliance costs	The costs for the TC-CCP will be higher for this option than the other options considering the large amount of data to be provided to ESMA, however the data will only be requested upon recognition application and review.
Policy option 2	
Benefits	It will ensure a limited set of main data to be provided to ESMA limiting the burden on ESMA and the TC-CCP.
Regulator's costs	The costs for regulators will be lower for this option than the other options considering the more limited amount of data to be assessed but the cost of tiering is anyway foreseen to be covered by the supervisory fees.
Compliance costs	The costs for the TC-CCP may be lower for this option than the other options considering the more limited set of data to be provided to ESMA.
Policy Option 3	
Benefits	It will ensure that a manageable, yet sufficient and pertinent set of data will be delivered to ESMA.

Regulator's costs	The costs for regulators will be slightly higher than in Option 2, considering a fair amount of data will be assessed but the cost of tiering is anyway foreseen to be covered by the supervisory fee.
Compliance costs	The costs for the TC-CCP will be slightly higher than in Option 2, considering a fair amount of data to be provided to ESMA, though it will to some extent derive from the scope of the CCPs business. It is worth noting though that most of this data is currently being provided in other contexts (for example CPMI IOSCO disclosure framework and current ESMA TC-CCP data request) and it will only be requested upon recognition application and review.



5.2 Annex III Technical advice to further specify the criteria for tiering

This annex presents an illustration of how the technical advice on tiering could be transposed in the Commission's Delegated Act.

EU CM means any CM established in the Union (including CMs established in Norway, Lichtenstein and Iceland) and any CM established or registered outside of the Union, but which belongs to a group where the parent undertaking is established or where its head office is in the Union.

Non-EU CM means a CM not qualifying as an EU CM.

EU client means a CM's client established in the Union and any client established outside of the Union, but which belongs to a group where the parent undertaking is established or where its head office is in the Union.

EU indirect client means a CM's indirect client established in the Union and any indirect client established outside of the Union, but which belongs to a group where the parent undertaking is established or where its head office is in the Union.

EU entity means an entity established in the Union including entities not established or registered in the Union, but which belong to a group where the parent undertaking is established or where its head office is in the Union.

Union Currency means any of the Union currencies including the currencies of Norway (NOK), Lichtenstein (CHF) and Iceland (ISK).

Asset class means a reference to relevant class of financial instruments including: bonds, structured finance products, securitised derivatives, interest rate derivatives, equity derivatives, commodity derivatives, foreign exchange derivatives, credit derivatives, C10 derivatives, CFDs, emission allowances and emission allowance derivatives.

Sub-asset class means a reference to an asset class segmented to a more granular level on the basis of the contract type and/or the type of underlying.

Article 1

The nature, size and complexity of the CCP's business

1. When ESMA takes into account the criterion in point (a) in paragraph 2a of Article 25 of Regulation (EU) No 648/2012, ESMA shall consider, to the extent relevant, the following indicators:

(a) The ownership, business and corporate structure of the CCP including assessing in detail: (i) the ownership structure specifying any qualifying holdings, (ii) other financial market infrastructures within the group to which the CCP belongs; and (iii) whether the CCP acts in several capacities.

To assess this indicator, ESMA could consider:

(i) the ownership structure, including material ownership interests and the ultimate ownership;

(ii) the corporate structure of the group to which the CCP belongs including whether the CCP belongs to the same group as other financial market infrastructures in the Union; and

(iii) the business structure, including the scope of the CCP's clearing services, whether the CCP acts in several capacities such as CSDs and the extent to which the CCP provides other services in addition to clearing services to EU entities or rely on any material services provided by EU entities.

(b) The financial instruments cleared by the CCP and the Member States where the CCP provides, or intends to provide, services specifying whether the instruments are (i) subject to the clearing obligation in the Union, (ii) denominated in or reference a Union Currency, (iii) issued by an EU entity, (iv) commodities relevant for the Union, and/or (v) executed on an EU TV or OTC.

To assess this indicator, ESMA could consider:

(i) the financial instruments (separated per asset/sub-asset classes) cleared by the CCP;

(ii) the Union Member States where the CCP provides or intends to provide clearing services or other relevant services either by itself, through CMs or through EU TVs;

(iii) the extent to which the financial instruments cleared by the CCP are subject to the EMIR clearing obligation under Article 4 of EMIR;

(iv) the financial instruments cleared by the CCP either denominated in a Union currency (or where at least one of the underlying assets is denominated in a Union currency) or reference a Union Currency and for each of those, the respective aggregate volumes or notional amounts;

(v) the financial instruments cleared by the CCP issued by an EU entity and for each of those, the respective aggregate volumes or notional amounts;

(vi) the financial instruments referencing commodities cleared by the CCP specifying (A) the extent to which the production of the underlying agricultural product is within the Union, (B) where they are physically settled, any place of delivery within the Union, or (C) where they are cash settled, the extent to which the settlement amount is based on prices for an underlying agricultural product for which at least one of the places of delivery is inside the Union, and for each of those, the respective aggregate volumes or notional amounts; and

(vii) to what extent the financial instruments cleared by the CCP are executed on an EU TV or traded OTC.

(c) the value and volume cleared by the CCP (i) at the level of the CCP, (ii) at the level of each EU CM, (iii) at the level of EU clients and EU indirect clients, where possible, and (iv) at the level of non-EU CMs where such CM clear on behalf of EU clients and EU indirect clients.

To assess this indicator, ESMA could consider:

(i) For positions:

(A) for securities transactions (including SFTs, bonds and/or bond baskets), the open positions/open interest;

(B) for ETD transactions, the value of open interest/turnover; and

(C) for OTC derivatives transactions, the net notional outstanding amount.

(ii) For clearing volumes:

(A) for securities transactions (including SFTs, bonds and/or bond baskets), the value of securities or transactions;

(B) for ETD transactions, the value of contracts/transactions; and

(C) for OTC derivatives transactions, the gross notional of transactions.

(iii) The positions and clearing volumes under (i) and (ii) should be provided:

(A) globally at CCP level per Union currency and across all currencies;

(B) for each EU CMs and to the extent the information is available, for each EU client and EU indirect client, per Union currency and across all currencies;

(C) per each asset class and sub asset class; and

(D) per asset class and sub asset class taking into account only products subject to the clearing obligation under Article 4 of Regulation (EU) No 648/2012.

(d) The transparency and liquidity of the relevant markets.

To assess this indicator, ESMA could consider:

(i) the nature, depth and liquidity of the market cleared and the level of information available to the relevant market participants on pricing and any generally accepted and reliable pricing-sources for the products cleared by the CCP;

(ii) whether quotes and/or (pre-trade) bid and offer prices and the depth of trading interests at those prices on/off TVs are made public; and

(iii) whether (post-trade) price, volume and time of the transactions executed or concluded on and off TVs are made public.

(e) The risk profile of the CCP.

To assess this indicator, ESMA could consider:

(i) whether the CCP has completed an assessment of its risk profile based on, for example, PFMLs and their related guidance, the methodology used and the result of the assessment; and

(ii) the CCP's internal risk models (for the calculation of margin, sizing of default funds and estimation of stressed liquidity needs) and rules, frameworks/policies and guidelines on legal/operational/business/financial risk covering different types of risks a CCP may be exposed to including (A) cyber-risk, (B) IT systems and data management including data compromise, IT disruption and IT failure, (C) third party risk and outsourcing, (D) theft, fraud and criminal activity, (E) settlements risk, (F) credit (including back-test results), liquidity, custody or investment risk and (G) default management procedures.

Article 2

The effect of a failure or a disruption of the CCP

1. When ESMA takes into account the criterion in point (b) in paragraph 2a of Article 25 of Regulation (EU) No 648/2012, ESMA shall consider, to the extent relevant, the following indicators:

(a) The margins, default fund contributions and eligible collateral.

To assess this indicator, ESMA could consider:

(i) the extent to which the CCP holds collateral issued by EU entities;

(ii) the extent to which the collateral is provided by EU entities directly or indirectly;

(iii) the total amount of collateral (before and after haircut) required and held by the CCP, separating cash and non-cash collateral and the total collateral required and held denominated in Union currencies (or where at least one of the underlying assets are denominated in a Union currency) separated by each Union currency;

(iv) the total amount of collateral (before and after haircut) required by or held for EU CMs, and where relevant due to the collateral structure, EU clients and EU indirect clients;

(v) the IM required and held at CCP level (in total) and by each EU CM and where relevant due to the collateral structure, EU clients and EU indirect clients, per asset/sub-asset class, specifying the IM both as a total (Union and non-Union currencies) and per Union currency;

(vi) the default funds, the contributions required and held (i) at CCP level (in total) and (ii) per EU CM and where relevant due to the collateral structure, EU clients and EU indirect clients, specifying the default fund both in total (Union and non-Union currencies) and per Union currency;

(vii) the peak and average VMs received or paid by the CCP (in total) and the peak and average VMs required by and provided to the CCP by each EU CMs and where relevant due to the collateral structure, EU clients and EU indirect clients, specifying the total VM both in total (Union and non-Union currencies) and per Union currency;

(viii) the extent to which EU CMs', EU clients' and EU indirect clients' margins and default fund contributions are bankruptcy remote; and

(ix) the eligible collateral accepted by the CCP with the corresponding haircut methodology (including processes for amendments) and the type of collateral held by the CCP.

(b) The committed/uncommitted resources and liquidity resources.

To assess this indicator, ESMA could consider:

(i) the estimated largest additional contribution to the CCP's waterfall of resources in case of the occurrence of 2 defaults under the same extreme but plausible market conditions used by the CCP to size its default funds;

(ii) the liquidity providers registered or established in the Union;

(iii) the amount of the total and for each Union currency, liquid resources to the CCP's benefit separated between (i) committed and uncommitted and (ii) type of liquid resources, for example cash deposits, and other resources such as credit lines backed by liquid collateral or repos;

(iv) the amount of total liquid resources provided by each EU entity to the CCP in total and specifying the amount in each Union currency;

(v) the average and peak aggregate daily values of incoming and outgoing payments in Union-currencies (separated by each Union currency); and

(vi) the average and peak aggregate daily values of incoming and outgoing payments from EU CMs (and where relevant EU clients and EU indirect clients).

(c) Settlement and payments, including the use of central bank money for settlement.

To assess this indicator, ESMA could consider:

(i) the CCP's settlement or payment cycle including the extent to which settlement or payment is made in Union currencies and whether EU entities are used for settlement or payment; and

(ii) the extent to which (a) central bank money is used for settlement or payment, (b) settlements or payments are made in Union currencies; and (c) the share of the CCPs flow is through the EU Real-Time Gross Settlement (RTGS) systems (directly or indirectly).

(d) Framework for recovery and resolution.

To assess this indicator, ESMA could consider:

(i) the extent to which the CCP is subject to a and complies with a framework (e.g. PFMLs) or regulation on recovery and resolution, the effect of such framework or regulation on the TC-CCP and its participants;

(ii) the recovery process/plan, the tools envisaged, the maximum liability for an individual CM and for all EU CMs in aggregate, and how the CMs (both jointly and separately) could be impacted by the tools if implemented;

(iii) the resolution process/regime, the tools envisaged, the maximum liability for an individual CM and for all EU CMs in aggregate, and how the CMs (both jointly and separately) could be impacted by the tools if implemented;

(iv) if there is any crisis management group;

(v) if any additional recourses could be required from CMs; and

(vi) the scope for state aid and the cases in which it could be activated.

Article 3

CCP's clearing membership structure

1. When ESMA takes into account the criterion point (c) in paragraph 2a of Article 25 of Regulation (EU) No 648/2012 ESMA shall consider, to the extent relevant, the following indicators:

(a) The identification of CMs and in particular EU CM, EU clients and EU indirect clients.

To assess this indicator, ESMA could consider:

(i) the identities and memberships of the CMs of the CCP; the extent to which the CCP has any EU CMs, and to the extent the information is available, the identities and memberships of EU clients or EU indirect clients; and

(ii) the EU CMs and EU clients or EU indirect clients share of the CCP's total clearing activity and share of transactions cleared divided by asset class.

(b) Access to the CCP and the clearing services provided by the CCP.

To assess this indicator, ESMA could consider:

(i) the different options available to access the CCP's clearing services (including different memberships), any access requirements and/or conditions for granting or denying access; and

(ii) the extent to which there are legal requirements on the CCP to grant access to clearing services.

Article 4

Alternative clearing services provided by other CCPs

1. When ESMA takes into account the criterion point (d) in paragraph 2a of Article 25 of Regulation (EU) No 648/2012 ESMA shall consider, to the extent relevant, the following indicator:

Substitutes to the CCP clearing service.

To assess this indicator, ESMA could consider:

(i) whether there are alternative clearing services to the CCP's clearing services offered to EU CMs, EU clients or EU indirect clients for financial instruments cleared by such CCP either denominated in Union currencies or, in a material volume of transactions in a certain asset class;

(ii) whether the CCPs EU CMs, EU clients or EU indirect clients already participate in other clearing services provided by EU market participants;

(iii) whether the alternative clearing services provides the same or equivalent clearing services, are authorised or recognised in the Union and where such CCP provides the services on an EU TV; and

(iv) whether the CCP is providing clearing in derivatives subject to the clearing obligation under EMIR.

Article 5

CCP's relationship, interdependencies, or other interactions

1. When ESMA takes into account the criterion point (e) in paragraph 2a of Article 25 of Regulation (EU) No 648/2012 ESMA shall consider, to the extent relevant, the following indicators:

(a) Outsourcing arrangements.

To assess this indicator, ESMA could consider the scope of services that have been outsourced to the CCP from EU entities.

(b) The links or connections with other financial market infrastructures, other financial institutions and the broader financial system.

To assess this indicator, ESMA could consider:

- (i) the extent to which EU TVs are served by the CCP;
- (ii) the extent to which the CCP has interoperability arrangements and/or cross-margining agreements with EU CCPs, or links with or participate in other financial market infrastructures located in the Union, such as central securities depositories or payment systems; and
- (iii) the volume and value of transactions cleared or settled by the CCP in Union currencies through these arrangements and other material services provided such as management of cash collateral.

Article 6

Relevance of the indicators

1. The main aspects considered by ESMA to determine if the CCP is systemically important to the Union and one or more of its Member States are contained in Articles 1(1)(b), 2(1)(a)(i)-(iii), 2(1)(b)(i)-(v), 3(1)(a), 4(1) and 5(1)(b).

2. Where EU CMs, EU clients or EU indirect clients has been identified under Article 3(1)(a), ESMA shall also assess the following indicators: Article 1(1)(c), Article 2(1)(a)(iv)-(ix), Article 2(1)(b)(vi) and Article 2(1)(d).

3. Where financial instruments with a relevance for the Union or one or more of its Member States has been identified under Article 1(1)(b), ESMA may assess the following indicators: Article 1(1)(c), Article 1(1)(d) and Article 3(1)(b) in conjunction with Article 4(1).

4. Where a CCP is identified as potentially systemically important under paragraph 1, the CCPs business and ownership will be assessed in accordance with Article 1(1)(a), ESMA may assess the following aspects under Article 1(1)(e), Article 2(1)(c) and Article 5(1)(a).