

**Mr Valdis Dombrovskis  
Executive Vice-President for an  
Economy that Works for People  
European Commission  
1049 Bruxelles / Brussels**

**Ref: EMIR 2.2 Delegated Acts on tiering criteria, comparable compliance and fees for third-country CCPs**

Dear Vice-President Dombrovskis,

I am writing to you in relation to the draft Delegated Acts (DA) under EMIR 2.2 on tiering criteria, comparable compliance and fees for third-country central counterparties (TC-CCPs) that the Commission published for consultation on 11 June 2020.

ESMA appreciates that the Commission duly considered the technical advice ESMA provided shortly after the adoption of EMIR 2.2 and recognises that the targeted, but important deviations from this advice that are proposed in the draft DAs aim to simplify the assessments for tiering and comparable compliance, while enhancing their predictability, and to further harmonise the fee framework for TC-CCPs with the rest of ESMA's supervised entities.

However, based on the multiple detailed discussions with competent authorities as well as the varied input received from stakeholders, throughout the development of our related technical advice, ESMA believes it is useful to raise to your attention a few key technical points, that we think the Commission should take into account when finalising the DAs.

Starting with the draft **DA on comparable compliance**, ESMA notes that comparable compliance shall be granted only where the Tier 2 CCP complies with the relevant minimum requirements of EMIR as set out in the DA. In this respect, ESMA deems it important that the final DA addresses the following concerns:

- 1) **On the relevance of CCP requirements set out in Commission Delegated Regulation 153/2013:** the minimum elements listed in Annex 1 of the draft DA only include provisions of requirements defined in Title IV of EMIR, disregarding the more detailed requirements specified in the respective Regulatory Technical Standards (RTS) set out in Commission Delegated Regulation (EU) 153/2013. In order to ensure a level playing field with EU-CCPs, ESMA suggests including in the minimum elements at least the relevant provisions of the RTS further specifying the prudential requirements.
- 2) **On the assessment for comparable compliance:** ESMA appreciates that under the draft DA it shall grant comparable compliance where the Tier 2 CCP complies with the

minimum elements of the EMIR requirements as set out in the draft DA. In particular, ESMA understands that comparable compliance could be accepted where the rules and procedures of the Tier 2 CCP meet such minimum elements, regardless of the minimum regulatory requirement applicable in the third country. In this case, in order to ensure that compliance with the minimum requirements of EMIR is maintained on an ongoing basis, the Tier 2 CCP should not only notify ESMA of any change to the third-country framework applicable to it, but also of any relevant changes to the relevant CCP's internal rules and procedures (as envisaged in Recital (7) of the draft DA).

- 3) **On the denial of comparable compliance:** ESMA believes that a refusal of comparable compliance should not have a direct impact on the equivalence decision, as the latter covers both Tier 1 and Tier 2 CCPs and assesses the TC framework against EMIR as a whole. The fact that a single Tier 2 CCP does not comply with the minimum elements relevant for comparable compliance is a supervisory decision addressed to an individual firm and should not per se imply that the third country framework is not equivalent with EMIR. Therefore, ESMA sees it more appropriate to inform the Commission only after the decision of denial of comparable compliance is adopted, and not before. This would preserve the independence of ESMA and avoid any suggestion of interference on a supervisory decision assigned to ESMA.

Furthermore, with respect to **incompatible requirements**, ESMA believes that the Commission would be in a better position to address incompatible requirements in the context of the equivalence decision by providing explicit exemptions for Tier 2 CCPs from specific EMIR requirements, where the comparison for the equivalence decision of the third-country framework with EMIR conducted by the Commission would detect a potential incompatibility, even though the third-country requirements achieve the same objectives. This approach would address this problem also for Tier 2 CCPs that would be required to comply with EMIR requirements, if comparable compliance was not requested.

In relation to the **DA on tiering**, the published draft contains a statement according to which *“ESMA may only determine, based on the criteria specified in Articles 1 to 5, that a TC-CCP is a Tier 2 CCP where at least one of the indicators in paragraph 1 is met.”* Whilst ESMA could agree with a two-step approach whereby triggering thresholds would allow for a further assessment of additional indicators to assess if a TC-CCP is Tier 2, the current drafting entails that no further assessment besides the application of the thresholds will be needed at the initial assessment and the rest of the indicators become irrelevant for a vast majority of TC-CCPs, and any additional assessment in addition to assessing the thresholds may be challenged.

While we understand the political considerations around the draft DA, we are concerned that the level of the thresholds might incentivise certain CCPs to take business decisions for the purpose of avoiding the application of the Tier 2 regime. Therefore, we suggest introducing a yearly revision clause for these thresholds.

We also struggle to see how the four chosen thresholds cover all the criteria required to be considered according to the Level 1 text, especially for an assessment mandated not only at Union level but also at Member State level. With the current draft, ESMA will not be in a position



to properly perform an assessment as foreseen in Article 25(2a) of EMIR in consultation with the relevant authorities, and there is a risk that a TC-CCP is not caught by the Tier 2 regime, even though it could be systemically important for one or more Member States.

Finally, with regards to the draft **DA on fees** to be charged by ESMA to TC-CCPs, we are concerned about the absence of any reference to the collection of fees in order to reimburse the Union budget for the advance that ESMA has received in 2019 and 2020 under the EMIR 2.2. Legislative Financial Statement. Therefore, excluding this important element from the DA on fees for TC-CCPs puts at risk ESMA's capacity to repay the advance to the Union budget.

Furthermore, we are concerned about the fact that the work and resources required for the application of the new thresholds for the tiering of TC-CCPs and the assessment of comparable compliance are not taken into account when establishing the fees.

Should you or your staff want to discuss further the subject matter of this letter or require any further information, please do not hesitate to contact me or Fabrizio Planta, acting Head of the CCP Directorate ([fabrizio.planta@esma.europa.eu](mailto:fabrizio.planta@esma.europa.eu)).

Yours sincerely,

**SIGNED**

Steven Maijor