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| Response Form to the Consultation Paper  |
| Technical Advice on Comparable Compliance under article 25a of EMIR  |

**Responding to this paper**

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex III. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **29 July 2019.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA\_QUESTION\_TACC\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA\_TACC\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_TACC\_ABCD\_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading “Your input – Open consultations” 🡪 “Consultation on Position limits and position management in commodities derivatives”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper**

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

**General information about respondent**

|  |  |
| --- | --- |
| Name of the company / organisation | CCP12, The Global Association of Central Counterparties |
| Activity | Other Financial service providers |
| Are you representing an association? |[x]
| Country/Region | Asia-Pacific |

**Introduction**

***Please make your introductory comments below, if any***

<ESMA\_COMMENT\_TACC\_1>

CCP12 welcomes the opportunity to comment on ESMA’s Consultation Paper on Technical Advice on Comparable Compliance under article 25a of EMIR (“the Consultation Paper”). CCP12 believes that embracing an approach of mutual regulatory deference is of the utmost importance in adopting an approach of comparable compliance. CCP12 believes such an approach is consistent with EMIR 2.2.

CCP12 would also like to make a comment regarding an issue that has not been raised in any of the proposed questions in the Consultation Paper. In the event that there may be a change in the comparable compliance regime (e.g., withdrawal of such finding, changes to the rules/assessment framework, revising assessment, and/or other material modifications) it is highly recommended that ESMA put in place a notice and comment period before enacting such changes due to the potential material impact upon third-country central counterparties (“TC-CCPs”) and, if enacted, provide reasonably sufficient time period for TC-CCPs to adjust.

<ESMA\_COMMENT\_TACC\_1>

**Questions**

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

<ESMA\_QUESTION\_TACC\_1>

While CCP12 agrees that the appropriate approach to an assessment for comparable compliance is one that is completed on an outcomes-basis; CCP12 does not believe the approach defined under the Consultation Paper achieves this. The Consultation Paper requires direct compliance with the majority of such requirements by requiring such CCP to adopt an EMIR floor for its practices, which is inconsistent with the legislative text of EMIR 2.2 that allows a TC-CCP that has been designated systemically important to the EU to satisfy the requirements to comply with Article 16 and Titles IV and V of EMIR through its compliance with applicable local legal and regulatory requirements. The proposed approach under the Consultative Paper effectively rewrites the legislative text of EMIR 2.2 by not providing a fulsome framework where comparable compliance can be determined because a TC-CCP designated systemically important to the EU is required to comply with the majority of EMIR. The legislative text of EMIR 2.2 requires that the European Commission (“EC”) adopts a delegated act that specifies “the minimum elements to be assessed for the purposes” of determining comparable compliance, but the Consultation Paper instead identifies minimum provisions of EMIR where comparable compliance cannot be found.

The proposed approach to comparable compliance under the Consultation Paper not only deviates from the legislative text of EMIR 2.2, but it also is inconsistent with the G20 commitments to adopting an approach of mutual regulatory deference with respect to the cross-border oversight of global derivatives markets. Following the financial crisis, the G20 committed “to take action at the national and international level to raise standards together so that our national authorities implement global standards consistently in a way that ensures a level playing field and avoids fragmentation of markets, protectionism, and regulatory arbitrage” (Group of 20, Leaders’ Statement, Pittsburgh Summit, pg. 7 (Sept. 2009), *available at* <https://www.fsb.org/wp-content/uploads/g20_leaders_declaration_pittsburgh_2009.pdf>.). Demonstrating the importance of this matter, the G20 continues to make commitments to regulatory and supervisory cooperation (*See* Group of 20, Leaders’ Declaration, Buenos Aires, pg. 5 (Nov. 2018), *available at* <http://www.g20.utoronto.ca/2018/buenos_aires_leaders_declaration.pdf>; Group of 20, Leaders’ Declaration, Saint Petersburg Summit, pg. 17 (Sept. 2013), *available at* <https://www.fsb.org/wp-content/uploads/g20_leaders_declaration_saint_petersburg_2013.pdf>.)

Approaches to regulatory deference rightfully allow local policy-makers to adopt legal and regulatory requirements that are appropriate for the markets they oversee. This was recognized in the adoption of the Committee on Payments and Market Infrastructures (“CPMI”) and International Organization of Securities Commissions’ (“IOSCO”) *Principles for financial market infrastructures* (“PFMIs”), which set out globally agreed upon standards for CCP risk management (Committee on Payment and Settlement Systems (later renamed the Committee on Payments and Market Infrastructures) and Technical Committee of the International Organization of Securities Commissions, Principles for Financial Market Infrastructures [hereafter, “*PFMI*”] (Apr. 2012).). Policy-makers must maintain the authority to adopt the appropriately tailored legal and regulatory requirements for the markets they regulate and supervise.

By not standing by the G20 commitments, ESMA’s proposals run the risk of fostering market fragmentation, which is also inconsistent with the objective of the current Japanese G20 Presidency to address market fragmentation (*See* Randal K. Quarles, Chairman Financial Stability Board, Letter to G20 Leaders, pgs. 3-4 (June 24, 2019), *available at* <https://www.fsb.org/wp-content/uploads/R250619-1.pdf>). As a proponent of robust and healthy markets, CCP12 is concerned about any legislation that could lead to market fragmentation, which can have the unfortunate effect of wider bid-ask spreads and weakened price discovery. These outcomes are concerning as they can challenge a CCP’s ability to effectively and efficiently manage a future market stress event. Ultimately, the Consultation Paper’s proposed imposition of EU laws and regulations on a TC-CCP designated systemically important to the EU could weaken the stability of the global financial system.

Notwithstanding the inappropriateness of the requirement under the Consultation Paper that a TC-CCP designated systemically important to the EU must comply with the majority of EMIR, the Consultation Paper fails to recognize that prior to a TC-CCP being recognized under EMIR that the EC must adopt an implementing act determining that the legal and supervisory arrangements under which such CCP complies are equivalent to the requirements under EMIR (i.e., “equivalence decision”). As such, the comparable compliance framework proposed under the Consultation Paper would effectively withdraw the equivalence decision reached by the EC and replace it with the determination of comparability because regardless of the equivalence decision, a TC-CCP designated systemically important to the EU would have to comply with the majority of EMIR. In line with the legislative text of EMIR 2.2 that “the provisions of the implementing act adopted in accordance with Article 25(6)” (i.e., equivalence decision) be taken into account, the minimum elements to be assessed for comparable compliance should be limited to the areas where the EC adopted conditions for determining equivalence, given that the EC has already found other areas equivalent (i.e., comparable).

It would not only be duplicative for an assessment of comparable compliance to extend beyond areas where conditions have been adopted under an equivalence decision, but it would also be ESMA acting in a capacity where they would be superseding the decision of the EC. While the Consultation Paper highlights that the assessment for an equivalence decision occurs at a jurisdiction-level and an assessment for comparable compliance occurs at a CCP-level, these assessments are one in the same, which could lead to ESMA’s assessment superseding the EC. The duplicative nature of ESMA’s comparable compliance assessment and the basis for it superseding the EC’s equivalence decision may cause legal and regulatory uncertainty and challenges. The practices a CCP employs must comply with local legal and regulatory requirements that are unquestionably clear, so to assess a TC-CCP’s practices on a requirement-by-requirement basis is unnecessary as such assessment has effectively already been completed by the European Commission in conjunction with the CCP’s ongoing registration with its local primary regulator.

To conclude, a holistic approach to comparable compliance appears preferable, in order to avoid duplicative requirements and unnecessary tensions across supervisory authorities, whilst ensuring high levels of information sharing. As per the tiering consultation, we note that EMIR 2.2 outlines other tiers for TC-CCPs which provide for appropriate supervisory approaches in the case of substantially systematic markets.

<ESMA\_QUESTION\_TACC\_1>

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

<ESMA\_QUESTION\_TACC\_2>

CCP12’s understanding is that the assessment for comparable compliance is conducted under on a requirement-by-requirement basis instead of an outcomes-basis, and that in many cases following the assessment, a TC-CCP may still be subject to adopting an EMIR requirement as a floor to its practices. In particular, the Consultation Paper defines minimum requirements of EMIR (hereafter, “core provisions”) whereby a TC-CCP must comply with requirements that are equal or at least as strict or conservative as the core provisions and if this is not the case, a TC-CCP designated systemically important to the EU must adopt the core provision as a floor.

Setting aside CCP12’s recommendation that the assessment for comparable compliance should focus solely on any areas where conditions have been identified under an equivalence decision, an assessment that is conducted on a requirement-by-requirements does not provide a mechanism where requirements can be assessed on an outcomes-basis. This is because the manner in which requirements work cohesively to set out a CCP’s practices cannot be accounted when they have to be evaluated on a standalone basis. CCP’s do not manage specific risks in a silo, so it is illogical and inconsistent with best practices in CCP risk management, which are to manage risks holistically, to conduct a comparable compliance assessment on a requirement-by-requirement basis. CCP12 recommends that ESMA ensure that the EC’s delegated act implementing an approach to comparable compliance is completed on an outcomes-basis and in turn, allow for requirements to be looked at holistically.

Additionally, in taking an outcomes-based approach to comparable compliance, it is important to recognize the expertise local regulatory authorities have to offer in setting requirements appropriately for the CCPs and the broader markets that they oversee. As such, an assessment for comparable compliance should recognize that even where it is completed on an outcomes-basis, requirements may not be equal or at least as strict or conservative between two distinct regulatory regimes. Even where given requirements are not equal or at least as strict or conservative as those under EMIR, this does not imply that such requirements are ineffective, fail to accomplish the outcome sought under EMIR, or deviate from internationally agreed upon standards (i.e., PFMIs). In line with the PFMIs, policy-makers appropriately tailor their respective legal and regulatory frameworks to their jurisdiction for the markets they oversee and the institutions that support them.

Conversely, we would also add that ensuring compliance with financial regulation is only one limited aspect of the role of a supervisor which monitors and supervises the daily activities of a CCP and is able to require more granular actions from the CCP beyond EMIR. In spite of the extra-territorial nature of some powers enshrined in EMIR, there are limits to the ability of ESMA to ensure that these decisions are effectively enforced, as the CCP would not be in ESMA’s jurisdiction (and that of the European Court of Justice). Therefore, a line-by-line compliance with EMIR would have limited effect on the expected orderly operations of the CCP and financial stability. Instead, we note that EMIR 2.2 outlines other tiers for TC-CCPs which provide for appropriate supervisory approaches in the case of substantially systematic markets.

<ESMA\_QUESTION\_TACC\_2>

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

<ESMA\_QUESTION\_TACC\_3>

No, CCP12 does not agree that the minimum elements to be specified in the EC’s delegated act should include the core provisions listed in Table 1. For the reasons outlined in CCP12’s responses to Q1 and Q2, an assessment of comparable compliance should be limited to any areas where conditions were identified in a given equivalence decision for a jurisdiction. Further, even where those areas are assessed, they should not be identified as “core provisions” (i.e., require that requirements are equal or at least as strict or conservative as those under EMIR) because as noted above, core provisions do not in fact allow for comparable compliance since an EMIR floor must be adopted by a TC-CCP designated systemically important to the EU.

<ESMA\_QUESTION\_TACC\_3>

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

<ESMA\_QUESTION\_TACC\_4>

While CCP12 does not agree with the approach of adopting a comparable compliance framework that designates certain requirements under EMIR as core provisions and that such requirements must be assessed on a requirement-by-requirement basis, to the extent that the European Commission does adopt a delegated act that implements such framework, CCP12 believes that where a non-EU jurisdiction’s requirement is on average, but not always, equal or at least as strict or conservative it should be accepted as comparable full stop, without having to adopt the corresponding EMIR requirement as a floor. (In line with CCP12’s response to Q1, the application of this approach should still be under a framework for assessing comparable compliance that is limited to the areas where the European Commission adopted conditions for determining equivalence.).

In line with CCP12’s response to Q1, designating certain EMIR requirements as core provisions does not actually put in place a comparable compliance framework, but instead just defines requirements where a TC-CCP that is designated systemically important to the EU must comply with EMIR. The imposition of an EMIR floor for the core provisions puts in place a framework where EU policy-makers are setting legal and regulatory requirements for jurisdictions in which they do not necessarily have any local expertise, which undermines the primary regulatory authority of local regulators. Not only does this diverge from the commitments of the G20, as referenced above, and the legislative text of EMIR 2.2, but it also results in a TC-CCP that is designated systemically important to the EU having to adopt practices that could be inappropriate for the markets it clears. Requiring these practices be adopted is a threat to the stability of the financial system, as a limitation on the ability of CCP to adopt practices that are tailored to their markets may undermine its ability to manage the next market stress event. In conjunction with their local primary regulators, CCPs must have the right, without obstruction, to adopt risk management practices appropriate for their markets and having a TC-CCP that is designated systemically important to the EU adopt an EMIR floor for its practices undermines this.

<ESMA\_QUESTION\_TACC\_4>

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

<ESMA\_QUESTION\_TACC\_5>

For the same reasons outlined in CCP12’s response to Q4, CCP12 does not agree with the approach of adopting a comparable compliance framework that relies on an assessment that is done on a requirement-by-requirement basis. However, to the extent this approach is taken, a TC-CCP’s requirement that is similar, but not always, equal or at least as strict or conservative, should be accepted as comparable (In line with CCP12’s response to Q1, the application of this approach should still be under a framework for assessing comparable compliance that is limited to the areas where the European Commission adopted conditions for determining equivalence.).

<ESMA\_QUESTION\_TACC\_5>

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

<ESMA\_QUESTION\_TACC\_6>

CCP12 does not agree with the modalities and conditions proposed for conducting such assessment, please see other answers for more details.

<ESMA\_QUESTION\_TACC\_6>

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

<ESMA\_QUESTION\_TACC\_7>

CCP12 does not agree that a TC-CCP that has been designated systemically important to the EU should include in its request for comparable compliance: i) the mapping of the requirements under EMIR for which comparable compliance is requested against its requirements, whereby each relevant article of EMIR and related RTS (paragraph-by-paragraph) is mapped with its corresponding requirement achieving the same regulatory objective; or ii) per each mapped requirement, the reason why compliance with its relevant requirement satisfies the corresponding requirement under EMIR.

Mapping requirements on a paragraph-by-paragraph basis, even more granular than requirement-by-requirement, does not allow ESMA to adopt an approach to comparable compliance that is done on an outcomes-basis. The format of the request for comparable compliance should allow for requirements to be assessed holistically. As such, CCP12 recommends that format for a comparable compliance request instead be broken down by categories of regulatory objectives under EMIR. This would support an outcomes-basis for comparable compliance that still provides for a factual basis of comparability in line with the legislative text of EMIR 2.2.

<ESMA\_QUESTION\_TACC\_7>

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

<ESMA\_QUESTION\_TACC\_8>

CCP12 does not agree that ESMA should be able to request that a TC-CCP that has been designated systemically important to the EU include in its request for comparable compliance an opinion of its supervisory authority on the accuracy of the representation of the requirements applying in its jurisdiction. Providing such an opinion is duplicative with the work done by the EC to adopt an equivalence decision for a jurisdiction. As noted above, the criteria for adopting an equivalence decision is that the legal and supervisory arrangements under which the relevant CCP complies are equivalent to the requirements under EMIR and that such CCP is subject to effective supervision and enforcement in its home country on an ongoing basis.

<ESMA\_QUESTION\_TACC\_8>

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

<ESMA\_QUESTION\_TACC\_9>

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<ESMA\_QUESTION\_TACC\_9>