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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 | FIA\_ISDA\_AFME |
| Activity | Other Financial service providers |
| Are you representing an association? |  |
| Country/Region | International |

**Introduction**

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

<ESMA\_COMMENT\_TACC\_1>

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

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

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

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

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

<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>

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

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

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

ESMA may wish to consider whether a deviation from one of the requirements in EMIR could be offset by compliance with another more conservative provision corresponding to another EMIR requirement, so that on the whole, the third country requirements applied by the TC-CCP in question would allow it to deliver the practical outcome of ensuring that EMIR’s regulatory objectives on the relevant issue are achieved. Further, even if requirements are closely related (e.g., requirements for margining, liquidity risk management, stress testing, etc.), a strict line-by-line approach may not allow ESMA to look at requirements holistically or make an outcomes-based determination of a TC-CCP’s comparable compliance, which we do not believe was the intention of EU legislators. For example, one requirement may specify the minimum margin period of risk for a given product without accounting for the origin of the account type clearing the product (e.g., customer or house) and another requirement may specify how account types must be margined (e.g., net versus gross). While looking at these requirements collectively, a CCP may be required to margin a customer account on gross-basis, implying a lower margin period of risk may be sufficiently risk mitigating, in comparison to where the same products in a customer account may be margined on a net-basis. This scenario is particularly concerning in the case of a comparable compliance assessment being conducted relative to requirements that have been identified as Core Provisions, since a TC-CCP could be required to adopt an EMIR floor to its practices, which would be in spite of its practices potentially already yielding outcomes that are at least as strict or conservative as those under EMIR. Consequently, a strict line-by-line approach could undermine the ability of ESMA to recognise the correlation between different provisions and therefore, we request these circumstances be able to be appropriately addressed in a comparable compliance assessment.

To facilitate its comparability assessment work, ESMA should liaise with third country regulators, and in particular with those who already have assessed the comparability of the EU CCP regime, in order to ensure that ESMA has a comprehensive picture and understanding of the rules applicable to the TC-CCP in question as well as how their enforcement is ensured and monitored by the relevant third country regulators across major derivatives markets. Both FIA and ISDA have previously expressed concerns about increased fragmentation of the global listed and cleared derivatives markets due to inconsistent and duplicative regulatory frameworks,[[2]](#footnote-3) and advocate a regime which provides for regulators to rely on their counterparts in other jurisdictions to supervise certain cross-border activity where they have implemented a regulatory regime that achieves comparable outcomes (the so called “deference” or “substituted compliance” approach). We recommend that ESMA also follows a similar outcomes-focused approach here.

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

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

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

(a) Table 1 currently includes (i) references to sub-sections of EMIR; and (ii) the RTS. It is unlikely that the rules of a third country would be specified in such detail as to mirror the detailed provisions set out in sub-sections of EMIR and the RTS. As such, annexing Table 1 to the Delegated Act would unduly constrict ESMA in such a way as to mean that ESMA would unlikely be in a position to reach a positive determination of comparable compliance for any TC-CCPs. Instead, we suggest that ESMA take a holistic view to assessing comparable compliance, and consider whether the regime to which the TC-CCP is subject is comparable to EMIR as a whole. For example, if the TC-CCP is subject to certain, more conservative provisions in some respects and less conservative provisions in others, the provisions taken as a whole mean that in practical terms the TC-CCP is subject to a regime that achieves the same regulatory outcomes as EMIR.

(b) The detail of the required information to be provided by Tier 2 TC-CCPs seeking a comparable compliance determination by ESMA is likely to place a significant cost and resource burden on each entity, which may lead some of them (smaller Tier 2 TC-CCPs) to withdraw from the EU market, to the detriment of EU clients. However, whether this will in practice have an impact will largely depend on the interplay between the rules relating to tiering and the rules relating to comparable compliance, and our assumption in this regard is that smaller TC-CCPs will not be classified as Tier 2. If a large number of TC-CCPs will be determined to be Tier 2 CCPs, then the risk of a high number TC-CCPs being unable to manage the process of providing all of the relevant information will be higher.

(c) By including the level of detail currently specified in Table 1, the risk of conflicts arising between the laws in the third country and the rules in EMIR is significant. As above, an outcomes focused approach would ensure that the TC-CCP complies with comparable standards, but would not require the third country jurisdiction to have in place detailed rules which mirror those set out in EMIR.

(d) ESMA would arguably introduce new policy objectives by annexing Table 1 to the Delegated Act, contrary to the Level 1 text.

Implications for the TC-CCP

We also recommend that ESMA clarify the practical impact of a comparable compliance determination, particularly in respect of ESMA’s supervisory powers over the TC-CCP. In particular, when a TC-CCP is determined to meet the standard of comparable compliance, ESMA should coordinate with the third country supervisor when exercising its supervisory activities (for example, if it wishes to carry out an investigation into the TC-CCP). It should also rely on the third country supervisors to enforce the TC-CCP’s compliance with the comparable requirements under the rules of the third country. As stated earlier, this approach is consistent with both FIA’s and ISDA’s earlier published papers[[3]](#footnote-4).

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

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

Confidentiality

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

<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>

We support an outcomes focused approach for ESMA’s comparability analysis, rather than a strict line-by-line approach, in order to ensure that TC-CCPs which are subject to conservative rules in their home jurisdiction are not determined to be non-compliant on the basis of a minor deviation from one of the EMIR requirements. ESMA proposes that for a TC-CCP jurisdiction’s requirements to be assessed as “*comparable*” to the core provisions of EMIR, those requirements must be “*equal or at least as strict or conservative as, the corresponding*” EMIR requirements. Where a requirement is not “*equal or at least as strict or conservative as the corresponding requirement under EMIR*”, the TC-CCP must adopt the EMIR requirement as a floor or minimum, through rules, policies, and procedures. By requiring that a TC-CCP jurisdiction’s requirements be “*equal or at least as strict or conservative as the corresponding requirement under EMIR*”, ESMA is proposing an approach that contradicts the Group of Twenty’s (“G20”) commitment to adopting an approach of mutual regulatory deference with respect to the cross-border oversight of global derivatives markets. In line with its commitments in September 2009, the G20 declared in September 2013 “that jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on “*similar outcomes*”. [[4]](#footnote-5) As set out in Consultation Report “Technical Advice on Comparable Compliance under Article 25a of EMIR”, an “*interpretation…whereby any requirement in the third country would be considered non-comparable if it is not equal or at least as strict…or conservative… as the corresponding EMIR requirement, would not be in accordance with Article 25a(3) of EMIR, where such requirements still achieve the regulatory objectives”.* We request that ESMA consider whether an assessment based on the ‘appropriate similarity’ of requirements would be more appropriate. Moreover, as noted in our response to Question 1, it is important that, in its final assessment, ESMA takes a holistic approach and consider whether a deviation identified in relation to one of the requirements in EMIR could be offset by compliance with another more conservative provision corresponding to another EMIR requirement so that, on the whole, the third country requirements applied by the TC-CCP in question would allow it to achieve the regulatory objectives of the EMIR requirements.

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

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

<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>

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

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

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

<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>

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

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

<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>

See answer in Q4.

<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>

We agree in principle subject to the following suggestions:

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

<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>

Yes.

<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>

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

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

<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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_TACC\_9>

1. <https://fia.org/sites/default/files/2017-09-07_EC_third_country_CCP_proposals.pdf>.; <https://www.isda.org/a/EVKDE/ISDA-Response-EMIR-2-Final.pdf>) [↑](#footnote-ref-2)
2. <https://fia.org/articles/fia-warns-increased-market-fragmentation-caused-regulation> and <https://www.isda.org/a/wpgME/Regulatory-Driven-Market-Fragmentation-January-2019-1.pdf>. [↑](#footnote-ref-3)
3. [See](file:///C:\Users\cschempp.FIAFII\OneDrive%20-%20FIA\Desktop\EMIR%202.2%20-%20FINAL%20RESPONSE\See) footnote 3. [↑](#footnote-ref-4)
4. Group of 20, Leaders’ Statement, Pittsburgh Summit, pg. 7 (Sept. 2009), *available at* <https://www.fsb.org/wp-content/uploads/g20_leaders_declaration_pittsburgh_2009.pdf>; Group of 20, Leaders’ Declaration, Saint Petersburg Summit, pg. 17 (Sept. 2013), *available at* <https://www.fsb.org/wp-content/uploads/g20_leaders_declaration_saint_petersburg_2013.pdf>. [↑](#footnote-ref-5)