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| Response Form to the Consultation Paper  |
| Draft technical advice on criteria for tiering under Article 25(2a) of EMIR2.2 |

**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\_TATC\_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\_TATC\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_TATC\_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\_TATC\_1>

CCP12 welcomes the opportunity to comment on ESMA’s Consultation Paper on draft technical advice on criteria for tiering under Article 25(2a) of EMIR 2.2 (“the Consultation Paper”). The approach undertaken in EMIR 2.2 is a progressive and risk-based approach, which enables EU policy makers and regulators to appropriately evaluate and distinguish between third-country central counter parties (“TC-CCPs”), rather than apply a one-size-fits-all treatment. It allows EU policy makers to strike the right balance allowing EU market participants to access healthy TC-CCPs, supported by well-regulated TC-CCPs and appropriately managing and curtailing systemic risk to the EU accordingly.

We are supportive of the outcomes-based approach that ESMA has intended to follow, however we do not believe this was achieved under the proposals in the Consultation Paper. First, we note that, not all tiers for TC-CCPs envisioned under EMIR 2.2 are addressed in this consultation. Secondly, it is unclear how the collection of a large amount of information as indicated throughout the Consultation Paper will allow ESMA to assess the systemic importance of a TC-CCP to the EU. We believe that some of the indicators chosen are not described in a measurable way and do not provide an indication as to whether each answer would suggest greater or lesser systemic importance.

Further, outside of the large amount of information collected, we are concerned that in many instances the information does not demonstrate a TC-CCP’s nexus to the EU, which is the basis of designating a TC-CCP systemically important to the EU or one of its Member States under EMIR 2.2. In particular, pursuant to the Article 25(2a) of EMIR 2.2, the criteria for evaluating a TC-CCP are all under the objective of determining if the TC-CCP is “systemically important for the financial stability of the Union or of one or more of its Member States.” As such, we believe it is critical that all related indicators, and underlying considerations, clearly establish a nexus to the EU (or lack thereof) so that importance to the stability of the EU can accordingly be determined.

Additionally, CCP12 is concerned that ESMA could require a large amount of information from each TC-CCP to fully assess the 14 indicators proposed. To reduce the burden on both TC-CCPs, as well as ESMA, CCP12 suggests that ESMA "pre-analyse" the relative importance of each TC-CCP based on a few criteria such as the Indicators 2, 3, and 6. Notwithstanding that we believe in some cases the information collected under the proposed indicators is irrelevant to determining a TC-CCPs systemic importance to the EU, regardless of outcomes of Indicators 2, 3, and 6, to the extent a TC-CCP has been identified based on these indicators as being of greater potential importance to the EU, ESMA could then request the information required for the other indicators from those TC-CCPs. CCP12 is concerned that requesting the full set of information required to assess all 14 indicators will place a high burden on relatively small TC-CCPs that are not systemically important to the financial stability of the Union or of one or more of its Member States.

<ESMA\_COMMENT\_TATC\_1>

**Questions**

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

<ESMA\_QUESTION\_TATC\_1>

In line with the legislative text of EMIR 2.2, to determine that a TC-CCP is systemically important to the stability of the EU or one of its Member States, CCP12 believes the proposed indicators to assess the nature, size and complexity of the TC-CCP’s business should more clearly focus on the nexus of the TC-CCP to the EU and in particular, its potential impact on stability, which is the overarching objective of the tiering criteria under EMIR 2.2. We believe that the indicators proposed in the Consultation Report provide a good foundation for establishing this nexus, however in some cases, the indicators, due to their broad nature, do not establish a clear nexus to the EU, which we do not believe was the intention of ESMA. In particular, the assessment of these indicators relative to a TC-CCP’s nature, size and complexity should clearly focus on its impact to the EU. Consequently, we have some detailed comments on each of those indicators listed below, as well as their relative weight in assessing systemic relevance.

With regards to Indicator 1, we do not believe that assessing the ownership and corporate structure of a TC-CCP is appropriate or can give a good indication as to the systemic importance of the TC-CCP to the stability of the EU. CCPs, whether standalone entities and/or part of a broader group, are fully resourced to cope with any extreme but plausible market conditions under their local legal and regulatory frameworks. The ongoing ability of a CCP to meet its regulatory obligations is independent of its ownership and corporate structure. Therefore, the ownership and corporate structure of a TC-CCP do not have a bearing on its systemic importance to the stability of the EU. In line with this, we believe that Indicator 1 should be removed.

Consistent with CCP12’s overarching comment that the indicators, in line with the legislative text of EMIR 2.2, should be used to determine if a TC-CCP is systemically important to the stability of the EU, we agree that Indicator 2 should be primarily focussed on the TC-CCP’s clearing for financial instruments denominated in EU currencies, which we believe was the intent of ESMA in the Consultation Paper. Such an approach would capture effectively those instances in which EU and non-EU market participants are using instruments denominated in EU currencies to manage their risks, which, assuming a significant amount of such instruments is cleared by a non-E.U. CCP, could impact the stability of the EU. Further, CCP12 believes that a risk-based measure, such as initial margin required, is more appropriate than volume or notionals to evaluate a TC-CCPs exposures to financial instruments denominated in EU currencies. Since the basis for determining a TC-CCP is systemically important to the EU is a risk-based determination, a risk-based measure such as initial margin required should be used. Notionals and volume are not adequate measures of risk and can be misleading even though they are often easily available and transparent metrics. CCP12 also notes that the legislative text under EMIR 2.2 does not specify the metric by which “value” of financial instruments denominated in EU currencies should be determined and as such, it is not only appropriate to rely upon initial margin required but also permitted pursuant to the legislative text. As such, CCP12 recommends that it be clarified that i) and iii) of Indicator 2 and the underlying considerations are with respect to financial instruments denominated in EU currencies and that the measure for assessing such clearing be based on initial margin required.

Similarly, regarding Indicator 3, the focus of the TC-CCP’s clearing for market participants should be on those market participants domiciled in the EU, which we believe was the intent of ESMA in the Consultation Paper. A TC-CCP’s clearing for non-EU market participants is immaterial to determining the systemic importance of a TC-CCP to the stability of the EU or one of its Member States. Further, we believe that the proposed metrics used for Indicator 3 to assess value could be misleading. As noted above, using volume and notional based metrics are not adequate measures for evaluating risk. By way of example, as proposed under Indicator 3, notional outstanding on daily volumes would only capture flows rather than actual volume, whereas initial margin required would capture the actual risk of exposures cleared by the TC-CCP. CCP12 also notes that the legislative text under EMIR 2.2 does not specify the metric by which “exposure” of EU market participants should be determined and as such, it is not only appropriate to rely upon initial margin required but it is also permitted pursuant to the legislative text. As such, CCP12 recommends that Indicator 3 clarify that its evaluation is limited to a TC-CCP’s clearing for EU market participants and that it be based on initial margin required.

For the same reasons outlined relative to Indicators 2 and 3, regarding Indicator 4, in determining whether a TC-CCP is systemically important to the stability of the EU relative to the “transparency and liquidity” of its markets, the focus on its markets should be on those denominated in EU currencies, to the extent it is necessary to evaluate this indicator. Transparency and liquidity of a relevant market are useful indicators to understand the market structure and price formation process but add limited value for assessing the systemic relevance of a market. Consequently, Indicator 4 could be removed.

Finally, regarding Indicator 5 and its use to assess the risk profile of a TC-CCP, we believe that assessing the risk profile of a TC-CCP only becomes relevant to the stability of the EU to the extent it has exposures to EU financial instruments and/or to EU market participants and as such, such exposures should be the trigger for the assessment of this indicator; however, its notable that these exposure must reach a level of significance to lead to a determination that a TC-CCP is systemically important. We believe the information collected regarding Indicator 5 will be fairly standard and is often included in every application for a licence globally. In line with this, we believe in addition to the information collected in TC-CCP’s application for recognition, the assessment of a TC-CCP’s risk profile should primarily rely on a confirmation of its adherence to the *Principles for financial market infrastructures* (April 2012) (“PFMIs”) as adopted and applied by its local primary regulator. The PFMIs set out globally agreed upon standards for CCP risk management practices, across a variety of areas, including those referenced in EMIR 2.2, legal, operational and business risk. We believe it is critical that in evaluating the risk profile of a TC-CCP that it recognizes that its risk management practices have been designed in recognition of the financial instruments it clears and the market participants it serves under a regulatory regime that was adopted and is applied by its local regulatory authority. Therefore, a TC-CCP’s adherence to the PFMIs as adopted by its local regulator provide a sufficient and strong basis to evaluate a CCP’s risk profile.

<ESMA\_QUESTION\_TATC\_1>

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

<ESMA\_QUESTION\_TATC\_2>

In line with CCP12’s comments regarding Indicator 5, an assessment of a TC-CCP’s risks and in particular cyber risks should be based on a confirmation of its adherence to the PFMIs as adopted and applied by its local primary regulator. Principle 17 of the PFMIs sets out globally agreed upon standards for CCP risk management practices, including those related to cyber risks. The assessment of a TC-CCP’s systemic importance to the stability of the EU must recognize that its risk management practices have been designed specifically for the financial instruments it clears and the market participants it serves under a regulatory regime that was adopted and is applied by its local regulatory authority.

Additionally, CCP12 notes that any assessment of a TC-CCP’s broader risk profile, including cyber-risks, only becomes relevant to the stability of the EU to the extent 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.

<ESMA\_QUESTION\_TATC\_2>

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

<ESMA\_QUESTION\_TATC\_3>

While we do not believe this was the intent of ESMA, CCP12 believes the broad nature of Indicators 6, 7, 8, and 9, and the underlying considerations, are inconsistent with the objective of EMIR 2.2 to determine that a TC-CCP is systemically important based on its relevance to the stability of the EU or one of its Member States because, in many cases, they fail to establish a nexus to the EU. In particular, the assessment of these indicators relative to the effect the failure of or a disruption to a TC-CCP could have should clearly focus on its impact to the EU.

With regards to Indicator 6, CCP12 believes the evaluation of a TC-CCP’s collateral held (e.g., margins and default fund contributions) should also include an evaluation of the protections for which such collateral is subject, in addition to the amount of such collateral denominated in EU currencies and/or collateral related to EU entities. A TC-CCP collects collateral from its market participants to cover potential future exposures and therefore, such practice is a risk mitigating one, so the more appropriate focus is not on the collateral holdings, but on the protections for which they are subject. In particular, in the event of a TC-CCP’s failure or disruption, the potential impact to stability would also be driven by the level of protections the collateral it holds are subject – e.g., collateral being bankruptcy remote. By way of background, we would like to note at this stage that it is not uncommon for some TC-CCPs to hold significant amounts of EU sovereign debt as initial margin, but when evaluating a TC-CCP’s systemic importance to the stability of the EU relative to the impacts of its failure, it is also important to consider the manner in which such collateral is protected. Therefore, CCP12 recommends that the robustness of bankruptcy remoteness arrangements for collateral would be an additional metric to assess a TC-CCP’s margins, default fund contributions, and eligible collateral under Indicator 6. CCP12 also believes that ESMA’s intent was for Indicator 6 to focus on evaluating a TC-CCP’s margins, default fund contributions, and eligible collateral denominated in EU currencies (regardless of the domicile of the entity) and/or for EU entities (regardless of the currency denomination of the collateral), since this collateral could potentially impact the stability of the EU or one of its Member States in the event the CCP fails. Unfortunately, CCP12 does not believe this focus is clear, so it respectfully requests that Indicator 6 be revised to clearly reflect this focus alone. CCP12 believes its proposed recommendations for Indicator 6, in conjunction with CCP12’s recommendations for Indicators 2 and 3 would provide a fulsome basis for assessing a TC-CCP’s systemic importance to the stability of the EU. Subject to CCP12’s recommendations, Indicator 6 would capture the protections of the collateral collected for margins that would be reported under CCP12’s recommendations for Indicators 2 and 3.

In line with CCP12’s overarching comment on the determination of systemic importance being based on the TC-CCP’s relevance to the stability of the EU, with regards to Indicator 7, in assessing the effects of its failure or disruption, a clear nexus to the E.U. should exist. Therefore, the assessment of the TC-CCP should primarily focus on its payment obligations to EU entities in EU currencies and the related committed and uncommitted liquidity resources to address such payment obligations. Focusing on such payment obligations and resources captures the direct primary impacts a TC-CCP’s failure could have on the stability of the EU or one of its Member States. Specifically, in the unlikely event of a TC-CCP’s failure or disruption, assessing payment obligations in EU currencies would capture the potential liquidity needs that would arise in such event for financial instruments denominated in EU currencies. This coupled with Indicator 7’s current proposed focus on liquidity providers domiciled in the EU, regardless of the currency in which they are providing liquidity, captures the primary effects the TC-CCP’s failure could potentially have on the stability of the EU or one of its Member States.

In line with CCP12’s comments regarding Indicator 5, with regards to Indicator 8 CCP12 believes that ESMA’s assessment of settlement and payments, including the use of central bank money for settlement should be based on a confirmation of its adherence to the PFMIs as adopted and applied by its local primary regulator. To the extent this approach is not taken, the settlement and liquidity characteristics of the products cleared should be taken into account when assessing these criteria. Also, the trigger for evaluation of a TC-CCP’s settlement and payments should be based on the involvement of EU currencies for EU market participants, as that is the point at which the TC-CCP’s settlement and payments practice may be relevant to the stability of the EU in the unlikely event of a TC-CCPs failure; however, its notable that the involvement of EU currencies must reach a level of significance to lead to a determination that a TC-CCP is systemically important.

In line with CCP12’s comments with respect to Indicators 5 and 8, regarding Indicator 9 we believe this indicator only becomes relevant to assessing the TC-CCP’s relevance to the stability of the EU to the extent it has exposures to EU market participants and thus, such exposures should be the trigger for the assessment of this indicator. In addition, as per Indicator 8, their exposures in EU currencies will be a key component to this indicator. Given the focus of this indicator is ultimately on the effects of a TC-CCPs failure or disruption on the stability of the EU, it’s appropriate for the primary trigger for evaluation being the TC-CCP’s exposures to EU market participants, since they could be directly subject to the effects of the TC-CCPs failure; however, its notable that these exposure must reach a level of significance to lead to a determination that a TC-CCP is systemically important. Where these exposures exist for a TC-CCP, in determining whether it is systemically important to the stability of EU relative to the effects of its failure or disruption as it relates to its recovery and resolution framework, a confirmation that the TC-CCP adheres to the PFMIs as adopted by its local regulator should be relied upon. The PFMIs 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 CCP have appropriate plans to address scenarios that could potentially prevent it from being able to provide its critical services.[[1]](#footnote-2) For same reasons as outlined relative to Indicator 5, it is critical that Indicator 9 recognize local jurisdictions’ adoptions of the PFMIs and the importance of this for a CCP to effectively manage the unique risks present in its markets.

<ESMA\_QUESTION\_TATC\_3>

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

<ESMA\_QUESTION\_TATC\_4>

Although we agree with ESMA’s proposal to assess and identify EU clearing members, we would like to emphasise the importance that strong membership criteria play in a CCP’s lines of defences. Regarding EU clearing members participation in a TC-CCP, any TC-CCP that has a significant number of EU entities that are clearing members and where those clearing members offer any form of clearing services to EU clients and EU indirect clients, should be taken under consideration in determining a TC-CCP’s systemic importance to the EU.

<ESMA\_QUESTION\_TATC\_4>

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

<ESMA\_QUESTION\_TATC\_5>

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<ESMA\_QUESTION\_TATC\_5>

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

<ESMA\_QUESTION\_TATC\_6>

CCP12 disagrees with ESMA’s suggested parameters to assess links or connections with other financial market infrastructures (“FMIs”), other financial institutions, and the broader financial system. We would 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 EU that could lead to a higher tiering as this could incentivise a TC-CCP to use more risky indirect links.

<ESMA\_QUESTION\_TATC\_6>

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

<ESMA\_QUESTION\_TATC\_7>

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<ESMA\_QUESTION\_TATC\_7>

1. *See e.g.*, Principles 3, 4, 7, and 15 of the PFMIs. [↑](#footnote-ref-2)