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| Response Form to the Consultation Paper  |
| ESMA fees for Third-Country CCPs under EMIR 2.2 |

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

This consultation is looking for feedback from third-country CCPs, market participants and authorities.

**General information about respondent**

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| --- | --- |
| 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\_TCTC\_1>

CCP12 welcomes the opportunity to comment on ESMA’s consultation paper on *ESMA fees for third-country CCPs under EMIR 2.2* (“the Consultation Paper”). As a general matter, CCP12 is concerned with the overall structure of the fee proposal under the Consultation Paper whereby third-country central counterparties (“TC-CCPs”) are responsible for funding the expansion of ESMA’s regulatory oversight. CCP12 finds TC-CCPs’ funding ESMA’s expansion particularly concerning in light of the proposals outlined in the ESMA consultation paper on *Draft technical advice on criteria for tiering under Article 25(2a) of EMIR2.2*, since the proposal could result in a TC-CCP with limited nexus to the EU being designated systemically important. Where this occurs, TC-CCPs that in reality have limited nexus to the EU would be responsible for funding a portion of a pan-European supervisory agency. In summary, CCP12 does not agree with concept of putting the costs on TC-CCPs to expand the EU’s regulatory oversight. However, CCP12 has answered the questions to address a circumstance where ESMA will nonetheless apply fees to TC-CCPs.

Furthermore, CCP12 finds that the level of any proposed fees is quite high, and these may act as a substantial barrier for TC-CCPs to provide their clearing services to EU clearing members, or to local subsidiaries of EU banking groups. Additional thought and consideration should be put into ESMA managing costs, as CCP12 believes there will be fewer CCPs requiring tiering than is expected. The nature of those entities electing to be tiered will be serious and they will dedicate the proper resources so the process can be completed quickly and efficiently. Consequently, ESMA should focus on simplifying the process whilst at the same time heightening transparency.

CCP12 also takes the position and implores that fees should be proportionate and reflect the role of the host supervisor. Proportion should be calculated not only on the potential supervisory role conducted by ESMA, which should be limited when it pertains to TC-CCPs, but also relative to other jurisdictions that charge fees, if any, for recognition as a TC-CCP. It would seem necessary for ESMA to at least conduct a comparative study in this regard and disclose the results. Lastly, reflecting the role of the host supervisor should provide deference to the home regulator thus reducing the cost put upon ESMA and thereby lowering fees as a TC-CCP is already regulated and need not another full-time and primary regulator relationship. In this regard and before this consultation becomes effective in some form, ESMA should consider where they could strengthen arrangements for such host-home supervisor relationship and thereby lessen costs/fees.

<ESMA\_COMMENT\_TCTC\_1>

**Questions**

1. : Do you agree with the proposed one-off fees for initial recognition for Tier 2 TC-TC CCPs? Please elaborate on the reasons for your answer.

<ESMA\_QUESTION\_TCTC\_1>

To the extent that one-off fees for initial recognition are charged, it is of the utmost importance that the determination of systemic importance for a TC-CCP is clearly with reference to the stability of the EU and/or one of its Member States and that the determination does not purport extraterritorially to influence, impact, or otherwise have unforeseen consequences on the determination of systemic importance in a TC-CCP’s home jurisdiction. However, we would like to point out that the current higher fee structure for Tier 2 CCPs may act as an incentive for ESMA to categorize more TC-CCPs as Tier 2 rather than Tier 1. Furthermore, although fees may be enacted, the amount of fees seem to be high considering the administrative measures needed to be undertaken. We hope that such fees, and the fees proposed in the Consultation Paper, can be reconsidered and reevaluated in order to be lowered to be more economically viable.

Additionally, the Consultation Paper notes that the one-off initial recognition fee amount for both Tier 1 and Tier 2 CCPs are driven by the same items – e.g., updating a MoU, tiering, etc. Therefore, the costs associated with the initial recognition of Tier 2 CCPs should be no different from those associated with Tier 1 CCPs. ESMA’s proposed fee for initial recognition should be amended to reflect that this fee is the same for all TC-CCPs, regardless of their being determined to be Tier 1 or Tier 2 CCPs. Where the current fee structure for the one-off initial recognition fee persists, ESMA is implying that a different level of assessment for determining that a TC-CCP is systemically important to the EU is done for prospective Tier 1 and Tier 2 CCPs. However, the assessment should be the same, as should be the related fees.

<ESMA\_QUESTION\_TCTC\_1>

1. : Do you agree with the proposed one-off fees for initial recognition for Tier 1 TC-TC CCPs? Please elaborate on the reasons for your answer.

<ESMA\_QUESTION\_TCTC\_2>

Due to the large liquidity pool that is often associated with EU clearing members (i.e. EU entities that face the CCP directly), it is often necessary for smaller CCPs to be recognized as TC-CCPs in order to establish viable clearing markets, albeit for a limited number of EU clearing members, and in order to secure qualifying central counterparty (“QCCP”) status for the reduced capital charge for local subsidiaries of EU banking groups. For many of these smaller CCPs, the proposed fee level for a Tier 1 CCP may act as a substantial barrier for them to provide their clearing services to EU clearing members, or to local subsidiaries of EU banking groups. The context of these explicit fees should be considered in addition to the hidden costs required for their preparation of the documentation required for the TC-CCP application to ESMA.

The current proposed level of fees for initial recognition may not be viable for smaller TC-CCPs, reducing the scope of markets that would be accessible by EU clearing members. To continue to facilitate access to smaller markets by EU clearing members, ESMA should consider establishing specific quantitative criteria for the assessment of the relative importance of each TC-CCP, such as the clearing volume denominated in EU currency derivatives, or the clearing volume by EU clearing members, below which ESMA would not charge, or would significantly reduce, the one-off fees for the initial recognition of a TC-CCP. In addition, to the extent that one-off initial recognition fees apply at all, ESMA should confirm that one-off fees for the initial recognition of Tier 1 TC-CCPs would not be payable by any existing recognized TC-CCP, or by those CCPs which have TC-CCP applications pending approval by ESMA.

<ESMA\_QUESTION\_TCTC\_2>

1. : Do you agree with the payment by a Tier 1 TC-CCP that becomes Tier 2 TC-CCP of the difference between the two fees? Please elaborate on the reasons for your answer.

<ESMA\_QUESTION\_TCTC\_3>

CCP12 notes that generally the high level of fees proposed to be applied should be reconsidered. Also, CCP12 does not agree with the difference in one-off initial recognition fees for Tier 1 and Tier 2 CCPs, as explained in its response to Q1. To the extent fees are applied on an ongoing basis to Tier 1 and Tier 2 TC-CCPs, they should be appropriately justified – e.g., due to increased regulatory and oversight costs.

<ESMA\_QUESTION\_TCTC\_3>

1. : Do you agree with the approach for determining the fees in 2019 for recognised or applicant TC-CCPs? Please elaborate on the reasons for your response.

<ESMA\_QUESTION\_TCTC\_4>

To the extent that annual fees apply, they should apply when the Delegated Act (“DA”) on tiering, comparable compliance, and fees are all adopted by the European Commission (“EC”).

<ESMA\_QUESTION\_TCTC\_4>

1. : Do you agree with the approach for determining the fees in 2020 and until end of transition period for recognised or applicant TC-CCPs? Please elaborate on the reasons for your response.

<ESMA\_QUESTION\_TCTC\_5>

To the extent that annual fees apply, they should apply when the DA on tiering, comparable compliance, and fees are all adopted by the EC.

<ESMA\_QUESTION\_TCTC\_5>

1. : Do you prefer Option A or Option B as an approach towards establishment of fees and discounts for comparable compliance? Please elaborate on the reasons for your response.

<ESMA\_QUESTION\_TCTC\_6>

Generally, it is important for ESMA to be conscious of cost associated with TC-CCPs in order to lower all proposed fees where possible. To the extent that annual fees are applied, CCP12 supports the proposal that such fees could be lowered based on a TC-CCPs comparable compliance. Where fulsome comparable compliance is found for a Tier 2 CCP then ESMA’s role significantly diminishes and this should be recognized and therefore, annual fees, if applied, should be nearly, if not, the same for Tier 1 and Tier 2 CCPs, since in this case, ESMA will be relying on the Tier 2 CCPs compliance with its local legal and regulatory requirements.

Where this approach is not adopted, CCP12 believes that Option B, where two levels of discounts based on the level of comparable compliance which is achieved, provides the more appropriate incentives through recognizing the reduce role of ESMA and the increased supervisory cost savings to CCPs. We note that higher levels of comparable compliance would lead to a substantial reduction in ESMA’s supervisory work, therefore greater cost discounts under such conditions could be considered, which Option B achieves more so than Option A.

<ESMA\_QUESTION\_TCTC\_6>

1. : Do you agree with the proposed approach to calculate first-year fees for TC-CCPs under EMIR 2.2? Please elaborate on the reasons for your answer.

<ESMA\_QUESTION\_TCTC\_7>

CCP12 conditionally agrees to the extent that annual fees apply, the specific trigger, submission, or other event as of or after which ESMA is deemed to be acting in a supervisory role vis-à-vis an applicant TC-CCP should be clear. In addition to the issue of clarity, query whether the “210 working days” is the appropriate measure, given that TC-CCPs may originate in jurisdictions where the number of working days is materially higher.

<ESMA\_QUESTION\_TCTC\_7>

1. : Do you agree with the proposed approach for the calculation of annual fees? Please elaborate on the reasons for your response.

<ESMA\_QUESTION\_TCTC\_8>

Considering that the EU has chosen to impose a newly detailed regulatory environment on TC-CCPs it is important to realize that this should be done in the most economically sensitive manner. The current level of fees proposed is quite high and creates unnecessary barriers of entry for a marketplace that should encourage competition and innovation. To the extent that annual fees apply, there should be a detailed enumeration of how this fee was aggregated and a breakdown of its components. In short, there should be reasonable justification through transparent audit of the fees charged. We hope that this process could encourage cost sensitivity and an overall reduction in the current proposed fees.

Additionally, regarding the structure of the annual fees for Tier 1 and Tier 2 CCPs, CCP12 believes this structure creates inappropriate incentives. The Consultation Paper outlines that the flat annual fees assessed to Tier 1 CCPs, along with one-off initial recognition fees, first-year fees, and withdrawal fees, will be subtracted from ESMA’s annual budget to determine the fees applied to Tier 2 CCPs. Under this structure, Tier 2 CCPs will be responsible for covering the funding gap that exists between ESMA’s proposed budget, in this case between 8 and 9 million Euros, and the fee amount collected from Tier 1 CCPs. Given the number of currently recognized TC-CCPs and size of ESMA’s proposed budget, ESMA would have to designate some TC-CCPs as Tier 2 CCPs to fully fund its budget. Therefore, the proposed fee structure creates a perverse incentive whereby ESMA must designate certain TC-CCPs as Tier 2 CCPs, not based on their systemic importance to the EU, but in order to maintain sufficient funding on an ongoing basis.

<ESMA\_QUESTION\_TCTC\_8>

1. : Do you agree with the proposed amount of annual   fees for Tier 1 TC-CCPs recognised under EMIR 2.2? Please elaborate on the reasons for your answer.

<ESMA\_QUESTION\_TCTC\_9>

For similar reasons as outlined in CCP12’s response to Q2, to continue to facilitate access to smaller markets by EU clearing members and local subsidiaries of EU banking groups, ESMA should consider establishing specific criteria for the assessment of the relative importance of each TC-CCP, below which ESMA will not charge, or would significantly reduce, the annual fees for TC-CCPs. The current proposed level of annual fees may not be viable for smaller TC-CCPs, reducing the scope of markets that would be accessible by EU clearing members and local subsidiaries of EU banking groups.

<ESMA\_QUESTION\_TCTC\_9>

1. : Do you agree in setting an equal flat fee for Tier 2 TC-CCPs instead of using the turnover represented by revenues generated by the Tier 2 TC-CCP for the purpose of calculating the Tier 2 TC-CCP   fees? Please elaborate on the reasons for your response.

<ESMA\_QUESTION\_TCTC\_10>

To the extent that annual fees are applied, CCP12 agrees with the use of an equal flat fee for Tier 2 CCPs, and does not believe that the use of a Tier 2 CCP’s revenues is an appropriate alternative for the determination of supervisory fees. Linking a TC-CCP’s systemic importance to revenues would seem arbitrary and implies that ESMA would need to more closely supervise TC-CCPs that are more profitable, which is counterintuitive. It is unclear how CCP revenue would directly lead to increased regulatory and supervisory activities by ESMA, since the complexity and size of the markets that a CCP clears are not necessarily reflected in its annual revenue.

Furthermore, such an approach with regards to supervisory fees could disincentivise TC-CCPs from improving their product range and risk management practices if they consider that those enhancements come at an additional arbitrary cost.

It is important to note that ESMA’s TC-CCP supervisory fees remain (i) proportionate and (ii) reflect the role of ‘host’ supervisor. CCP12 believes that ESMA’s fees should remain (i) considerably less than the ones levied by the “home” regulator who is the principal supervisory authority of that TC-CCP and (ii) in line with other ‘host’ supervisors of the said CCP.

<ESMA\_QUESTION\_TCTC\_10>

1. : In case of considering use of revenues as more appropriate alternative, please detail whether you agree with the inclusion of (i) all revenues generated by the CCP, irrespective whether from clearing, treasury or membership linked to EU, such as those generated with regards to EU venues, EU counterparties, including their non-EU branches and non-EU subsidiaries, financial instruments, contracts and transactions cleared by the CCP where at least one of the currencies is ESCB currency or (ii) all revenues generated by the Tier 2 TC-CCP should be taken into account? Please elaborate on the reasons for your response.

<ESMA\_QUESTION\_TCTC\_11>

As noted above in CCP12’s response to Q10, CCP12 does not believe that a fee based on the revenue of a Tier 2 TC-CCP is appropriate for the reasons outlined in that answer.

<ESMA\_QUESTION\_TCTC\_11>

1. : Do you agree with the proposed fees for withdrawal of recognition of the TC-CCP? Please elaborate on the reasons for your response.

<ESMA\_QUESTION\_TCTC\_12>

CCP12 disagrees with the proposed fees for withdrawal of recognition of the TC-CCP. From the explanation in the Consultation Paper, it is difficult to understand the justification for applying a withdrawal fee, or to envisage any significant workload for ESMA that would justify the charging of fees for the processing of a withdrawal request.

<ESMA\_QUESTION\_TCTC\_12>

1. : Do you agree with the proposal for the payment conditions of the applicable initial recognition fee under EMIR 2.2.? Please elaborate on the reasons for your answer.

<ESMA\_QUESTION\_TCTC\_13>

To the extent that an initial recognition fee applies, CCP 12 believes that the initial recognition fee should be paid upon approval of the TC-CCP’s application.

<ESMA\_QUESTION\_TCTC\_13>

1. : Do you agree with the proposal for the payment conditions of the additional fee for comparable compliance? Please elaborate on the reasons for your answer.

<ESMA\_QUESTION\_TCTC\_14>

To the extent that an additional fee for comparable compliance applies, we believe that similarly to the one-off initial recognition fee, the comparable compliance fee should be due upon successful completion of the application. Given the amount of resources a CCP must dedicate to put together both recognition and comparable compliance application files, we believe that any fees should only be due when/if the application is approved by ESMA. On the contrary, ESMA’s approach would result in significant additional costs to be borne by a TC-CCP which ultimately may not benefit from comparable compliance in the future.

Without prejudice to the foregoing, ESMA may wish to consider payment conditions that incorporate processing milestones, including, for example only, submission of particular documents, the return of ESMA questions or requests for clarification, et cetera.

<ESMA\_QUESTION\_TCTC\_14>

1. : Do you agree with the proposal to not reimburse TC-CCPs in case they decide to withdraw their application for recognition before recognition is granted? Please elaborate on the reasons for your response.

<ESMA\_QUESTION\_TCTC\_15>

CCP12 believes ESMA overestimates the number and complexity of applications for TC-CCPs and does not understand the basis of ESMA’s reasoning. In reality, this process will mostly consist of TC-CCPs that are dedicated and serious in nature without any incentive to withdraw. Furthermore and beyond the large market players, by virtue of function, countries have a handful of CCPs at most. Therefore, and as stated in other responses, to incentivize market participation and encourage the application process we suggest to the extent that fees are applied they are charged at the end of the recognition process. However, if it is decided to undertake fee collection at the outset, such fees (or a pro rata portion of such fees) should be reimbursed to the applicant, which has withdrawn its application. Lastly, it is concerning that ESMA raises such issue as this implies the process may warrant withdrawal due to the non-transparent and overly complex nature of the process. We hope that this implication is unwarranted and careful consideration can be made into simplifying the process and timeline so that withdrawal would likely never be a factor.

<ESMA\_QUESTION\_TCTC\_15>

1. : Do you agree with the proposal that TC-CCPs pay their annual   fees by 31 December of the year preceding the one for which the fees are due? Please elaborate on the reasons for your response.

<ESMA\_QUESTION\_TCTC\_16>

To the extent that annual fees apply, they should not be amendable, or amended, during the course of a calendar year; amendments to fees made during a calendar year should only be effective as of the following calendar year.

<ESMA\_QUESTION\_TCTC\_16>

1. : Do you agree with the proposal that TC-CCPs pay the relevant withdrawal fee at the time of initiation of the process for the adoption of ESMA’s decision on withdrawal? Please elaborate on the reasons for your response.

<ESMA\_QUESTION\_TCTC\_17>

CCP12 disagrees with the proposal that TC-CCPs pay withdrawal fees. There is no apparent justification for the adoption of a withdrawal fee. Please see CCP12’s response to Q12.

<ESMA\_QUESTION\_TCTC\_17>

1. : Do you agree with the proposal for the timing of payment of the 2019 and 2020 fees? Please elaborate on the reasons for your response.

<ESMA\_QUESTION\_TCTC\_18>

CCP12 disagrees with the proposal for the timing of payment for the 2019 and 2020 fees. By way of background, many CCP12 members are themselves precluded from assessing fees retrospectively. It stands to reason, therefore, that a TC-CCP’s regulator should not systematically engage in a process – retroactive assessment of fees – that is explicitly prohibited for those entities which it supervises. In the scenario contemplated, and pursuant to the proposed fee levels, the assessment of accrued fees for both 2019 and 2020, in arrears, may reasonably be seen to raise the prospect of material negative impact on the financial statements of TC-CCPs.

<ESMA\_QUESTION\_TCTC\_18>