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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**

|  |  |
| --- | --- |
| Name of the company / organisation | CME Group Inc. |
| Activity | Regulated markets/Exchanges/Trading Systems |
| Are you representing an association? |  |
| Country/Region | North-America |

**Introduction**

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

<ESMA\_COMMENT\_TCTC\_1>

CME Group Inc. (“CME Group”), the parent of Chicago Mercantile Exchange Inc. (“CME”), a registered derivatives clearing organization (“DCO”) with the Commodity Futures Trading Commission (“CFTC”), appreciates the opportunity to comment on the European Securities and Markets Authority’s (“ESMA”) consultation paper on *ESMA fees for Third-Country CCPs under EMIR 2.2* (“the Consultation Paper”).[[1]](#footnote-2) CME’s clearing house division offers clearing and settlement services for exchange-traded futures and options on futures contracts, as well as certain swaps, including interest rate swap products.

CME Group believes that the European Union (“E.U.”) should adopt a policy of mutual regulatory deference with respect to the oversight of non-E.U. based central counterparties (“CCPs”).[[2]](#footnote-3) For decades, such a policy has successfully allowed market participants around the world to hedge their business risk using exchange-traded derivatives (“ETD”) markets. It also supports efficient markets by generating deep pools of liquidity, encouraging efficient price discovery, and reducing market fragmentation. The CFTC has long permitted CCPs domiciled outside of the United States (“U.S.”) to clear foreign (i.e., non-U.S.) futures for U.S. persons without being subject to CFTC supervision or oversight.[[3]](#footnote-4) In particular, the CFTC has for decades relied on already issued outcomes-based comparability determinations for non-U.S. regulators or exchanges and the firms they oversee, including, but not limited to, for France, Germany, and Spain. An outcomes-based approach is designed to ensure that a CCP is appropriately overseen, while acknowledging specific requirements may differ in different jurisdictions to accommodate differences in regulatory and market structure. Furthermore, in 2016, after extensive negotiations, the CFTC and E.U. reached an important milestone in furthering mutual regulatory deference by entering into an equivalence agreement, which addresses the E.U.’s key concerns with respect to addressing systemic risk that non-E.U. CCPs may pose to the E.U. This agreement was followed by the E.U.’s recognition of individual U.S. DCOs, including CME, so that E.U. market participants can efficiently access U.S. – futures and swaps markets for their hedging needs.

**Executive Summary**

ESMA’s proposed scheme for setting fees for non-E.U. CCPs undermines mutual regulatory deference. It would fund ESMA’s own regulatory expansion through the imposition of unwarranted, excessive fees on non-E.U. CCPs, like CME, which provide services to E.U. market participants. ESMA’s proposed fee structure for non-E.U. CCPs, when combined with ESMA’s proposals for determining whether a non-E.U. CCP is systemically important to the E.U., could result in non-E.U. CCPs with a highly attenuated nexus to the E.U. funding to ESMA’s regulatory expansion. ESMA’s proposed fee arrangements as structured may incentivize ESMA to base its tiering decisions for non-E.U. CCPs on ESMA’s own financial requirements, rather than an objective analysis of the CCP’s systemic risk to the E.U. CME Group respectfully urges ESMA to reevaluate its proposed fee structure, and to the extent fees on non-E.U. CCPs are necessary pursuant to EMIR 2.2[[4]](#footnote-5), revise the fee structure to ensure that the financial burdens associated with ESMA’s operations are appropriately allocated.

While CME Group does not agree with the core concept of the fee proposal, we have addressed the most relevant questions below based on the assumption that some fees may be charged to non-E.U. CCPs. Our answers to these questions should not be read to imply that we support non-E.U. CCPs underwriting the expansion of ESMA’s regulatory apparatus.

To the extent that fees are applied to non-E.U. CCPs, CME Group still objects to ESMA’s proposed approach for imposing fees on non-E.U. CCPs in several respects. First, CME Group disagrees with ESMA’s proposal to make the fees for initial CCP recognition dependent on a non-E.U. CCP’s designation as a Tier 1 CCP (i.e., CCPs determined not systemically important to the E.U.) or Tier 2 CCP (i.e., CCPs determined systemically important to the E.U.). In the absence of clear criteria for designating a non-E.U. CCP as a Tier 1 or Tier 2 CCP, the difference in fees creates an incentive to determining tiering based on a desire to maximize fees. Further, ESMA does not provide a clear explanation as to why fees for Tier 1 and Tier 2 CCPs should be different. To the extent that fees apply, we instead propose a uniform recognition fee for Tier 1 and Tier 2 CCPs, which would be consistent with an objective approach to assessing non-E.U. CCPs for tiering purposes. Second, CME Group objects to ESMA’s proposed approach for calculating annual fees, because the approach similarly creates inappropriate incentives for ESMA to determine that a non-E.U. CCP is a Tier 2 CCP. As we explain below, ESMA’s fee determination methodology will likely lead to a funding gap, and as a result, ESMA’s determination of which non-E.U. CCPs are Tier 2 CCPs could be driven by the need to make up this shortfall. An objective and quantifiable tiering test for determining a non-E.U. CCP’s systemic importance to the E.U. might safeguard against this mis-incentive, but ESMA has not proposed such an approach, as we explain in our comment letter on ESMA’s consultation paper on *Draft technical advice on criteria for tiering under Article 25(2a) of EMIR*.[[5]](#footnote-6) Third, CME Group urges ESMA not to adopt a fee for Tier 2 CCPs based on CCP turnover, as turnover is not necessarily indicative of the size of a CCP’s clearing market or the risk the CCP represents. Lastly, CME Group objects to ESMA’s proposal to impose fees for withdrawing the recognition of a non-E.U. CCP. A non-E.U. CCP may choose to withdraw from recognition for a variety of reasons, and if it does, it should not be charged a regulatory fee for no longer offering regulated clearing services in the E.U. We note that in the U.S., the CFTC does not impose fees on non-U.S. CCPs seeking comparable recognition to service U.S. clients – either for the initial recognition or on-going operation.

<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>

CME Group does not agree with the proposed one-off fees for initial recognition of Tier 2 CCPs as compared to the fees charged to Tier 1 CCPs. The Consultation Paper suggests that the initial recognition fee amount is driven by the costs associated with the initial tiering (i.e., determination of whether a non-E.U. CCP is systemically important) and recognition, updates to memorandums of understanding, and a required equivalence assessment. ESMA has not justified why the costs associated with the initial tiering and recognition of Tier 2 CCPs should be different from those associated with Tier 1 CCPs. Consequently, if ESMA continues to believe that an initial recognition fee is appropriate, the proposed fee for initial recognition, to the extent it applies, should be amended to reflect that this fee is the same for all non-E.U. CCPs, whether determined to be Tier 1 or Tier 2 CCPs.

Under EMIR 2.2, at the time of tiering, ESMA is required to assess the systemic importance of every recognized non-E.U. CCP. Even if ESMA ultimately does not determine that a CCP qualifies as a Tier 2 CCP, ESMA should be applying the same degree of diligence to every assessment. The proposal of a differentiated fee for the initial recognition of Tier 2 CCPs from that charged to Tier 1 CCPs suggests that ESMA intends to undertake a different, more resource-intensive, assessment of those non-E.U. CCPs it expects to qualify as Tier 2 CCPs from those it expects to qualify as Tier 1 CCPs. If that is true, ESMA would seem to have pre-judged the outcome of its tiering determinations. If the tiering process is to be conducted objectively, then the same degree of diligence should be applied to assessing the systemic importance of every non-E.U. CCP and therefore, the same fee should be charged to all non-E.U. CCPs for initial recognition. The differences in ESMA’s resource allocation to Tier 2 CCPs versus Tier 1 CCPs, if any, might occur as part of any potential ongoing supervision of those CCPs.

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

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<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>

TYPE YOUR TEXT HERE

<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>

CME Group does not agree with the proposed approach to calculate annual fees. First, we believe that seeking to raise funds necessary for ESMA’s regulatory expansion from non-E.U. CCPs is inappropriate. Second, ESMA’s proposed funding structure creates even more significant concerns because it creates inappropriate incentives for ESMA to designate non-E.U. CCPs as Tier 2 CCPs.

Based on our review of the proposals under the Consultation Paper, CME Group understands 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. We further understand that the Legislative Financial Statement projects 49 full-time equivalent staff and a steady state budget of around 8 to 9 million Euros.[[6]](#footnote-7)

If we assume that the 34 non-E.U. CCPs that ESMA currently recognizes choose to continue their recognition[[7]](#footnote-8), the annual fees from those CCPs, assuming they are Tier 1 CCPs, would equal 1.7 million Euros. As the one-off initial recognition fees inevitably decline to near zero, this will leave a deficit in ESMA’s funding of at least 6.3 million Euros based on current estimates.[[8]](#footnote-9) To fill this funding deficit, the primary option available to ESMA under the Consultation Paper will be to designate enough non-E.U. CCPs as systemically important to cover the 6.3 million Euro funding shortfall. This is because the proposal in the Consultation Paper assumes that Tier 2 CCPs will fill the entire funding gap between the ongoing flat fees collected by ESMA for Tier 1 CCPs, one-off initial recognition fees, and one-off first-year fees, and its budget for regulating and supervising non-E.U. CCPs.

The incentive to designate non-E.U. CCPs as systemically important under the proposed fee structure would be less problematic if the determination of Tier 2 CCP status was based on an objective, targeted, quantitative test that assessed a non-E.U. CCP’s systemic importance to the E.U. and its Member States. Unfortunately, this is not the case. In fact, the indicators proposed by ESMA for determining whether a non-E.U. CCP is systemically important to the E.U. are largely not objective or quantitative in nature and, of utmost concern, those indicators do not necessarily require that any E.U. nexus exist for a finding of systemic importance.

Under the fee structure outlined in the Consultation Paper, the question that will drive ESMA’s determination of whether a non-E.U. CCP is systemically important to the E.U. may not be whether, based on an objective analysis, any non-E.U. CCPs are systemically important to the E.U., but rather how many non-E.U. CCPs ESMA must designate as systemically important to ensure that it has enough funding on an ongoing basis. In short, in making a systemic importance determination for a non-E.U. CCP, ESMA has a stark conflict of interest. We are greatly concerned with the implications of this fee structure and recommend that ESMA revise its calculation of annual fees, to the extent they apply, to eliminate the misalignment of incentives for the designation of non-E.U. CCPs as systemically important under the current proposal outlined in the Consultation Paper.

<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>

TYPE YOUR TEXT HERE

<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>

While CME Group disagrees with the overall annual fee structure proposed in the Consultation Paper, it is unclear how CCP turnover would directly lead to an increase in ESMA’s regulatory and supervisory activities. The complexity and size of the markets that a CCP clears are not necessarily reflected in its annual turnover. Thus, the creation of a turnover-based fee risks imposing unwarranted financial costs on non-E.U. CCPs that do not create a significant regulatory or supervisory burden for ESMA.

Additionally, to the extent that annual fees apply, it is unclear to CME Group why a non-E.U. CCP that is a Tier 1 CCP versus a non-E.U. CCP that is a Tier 2 CCP that has received a positive determination of comparability under Article 25a of EMIR 2.2 should be subject to differing levels of annual fees. Where a Tier 2 CCP has received a positive determination of comparability, ESMA’s regulatory and supervisory activities should be the same for that CCP as they are for a Tier 1 CCP, since ESMA has deferred to the Tier 2 CCP’s compliance with the requirements adopted under its home country’s regulatory framework.

<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>

Please refer to CME Group’s response to Q10. CME Group does not believe that revenues/turnover is an appropriate metric for determining the amount of fees paid by any non-E.U. CCP, including a Tier 2 CCP.

<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>

CME Group does not agree with the proposed fees for withdrawal of recognition of a non-E.U. CCP. The rationale for the withdrawal fee is unclear and suggests that any non-E.U. CCP withdrawing from recognition with ESMA is winding down its clearing services. A non-E.U. CCP’s withdrawal from recognition with ESMA would not necessarily be driven by a full wind-down of its clearing services. Instead, a non-E.U. CCP may have simply decided to cease offering regulated clearing services in the E.U. This could occur for a variety of reasons, ranging from reduced E.U. market participant interest to the undue regulatory burden ESMA has proposed to impose on non-E.U. CCPs for their ongoing recognition. To the extent that ESMA determines that a withdrawal fee remains necessary notwithstanding these points, ESMA should more clearly explain the rationale and reconsider whether the amount of the proposed fee is justified.

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

Please refer to CME Group’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>

CME Group does not agree with the proposed timing for the payment of the 2019 and 2020 fees. ESMA’s proposal involves a retroactive assessment of fees. This would prevent non-E.U. CCPs from appropriately budgeting for this cost. It is incumbent on ESMA to undertake accurate budgeting. It is unacceptable that non-E.U. CCPs would face retrospective bills through no fault of their own, and non-E.U. CCPs should instead expect ESMA to prospectively bill them accurately to the extent that fees are applied.

<ESMA\_QUESTION\_TCTC\_18>

1. European Securities and Markets Authority, *Consultation Paper*, *ESMA fees for Third-Country CCPs under EMIR 2.2* [hereafter, “*Consultation Paper*”] (May 2019), *available* <https://www.esma.europa.eu/sites/default/files/library/esma70-151-1663_cp_on_emir_2_2_ccp_fees.pdf>. [↑](#footnote-ref-2)
2. CME Group Inc., Letter in response to a *Proposal for Amending Regulations Regarding the Recognition of Third-Country Central Counterparties* (Oct. 2017), available at <https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-331/feedback/F7443_en?p_id=30988>. [↑](#footnote-ref-3)
3. In this letter, for ease of reference, CME Group has adopted the nomenclature used in the E.U. of exchange-traded derivatives (or “ETD”) to describe the different kinds of products that may be cleared. These terms do not translate perfectly under U.S. law which, as a matter of statute enacted by Congress, treats futures and swaps separately and differently for many important regulatory purposes. For example, under U.S. law all futures must be ETD but only some swaps must be ETD. In addition, the same broad and longstanding mutual regulatory deference approach for cross-border clearing of futures that the CFTC has taken has not yet been adopted for swaps clearing, although the CFTC is considering new proposals to move more in this salutary direction. These considerations illustrate that each jurisdiction has differing approaches to these regulatory matters which often make it difficult, if not impossible, to achieve identical regulatory treatment. For that reason, regulators world-wide have long recognized that comparable and equivalent outcomes must be the touchstone of effective cross-border deference. [↑](#footnote-ref-4)
4. Council of the European Union, Regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for authorisation of CCPs and requirements for recognition of third-country CCPs – Confirmation of the final compromise text with a view to agreement [hereafter, “EMIR 2.2”] (March 2019), *available at* <https://data.consilium.europa.eu/doc/document/ST-7621-2019-ADD-1/en/pdf>. [↑](#footnote-ref-5)
5. European Securities and Markets Authority, *Consultation Paper*, *Draft technical advice on criteria for tiering under Article 25(2a) of EMIR 2.2* (May 2019), *available at* [https://www.esma.europa.eu/sites/default/files/ library/esma70-151-2138\_cp\_ta\_on\_tiering\_criteria.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-151-2138_cp_ta_on_tiering_criteria.pdf). [↑](#footnote-ref-6)
6. *Consultation Paper* at ¶ 24. [↑](#footnote-ref-7)
7. Note, non-E.U. CCPs may not decide to continue to be recognized following the implementation of EMIR 2.2 given the undue level of regulatory burden ESMA proposes to associate with the maintenance of ongoing standing as recognized. [↑](#footnote-ref-8)
8. CME Group notes that budgets for financial regulatory agencies rarely decline so this hole in funding is based on conservative estimates. [↑](#footnote-ref-9)