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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 | SIX x-clear AG |
| Activity | Central Counterparty |
| Are you representing an association? |[ ]
| Country/Region | Switzerland |

**Introduction**

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

<ESMA\_COMMENT\_TCTC\_1>

 We would like to express our appreciation for the work ESMA has dedicated to the current consultations, and the clear desire to implement a solid operating framework for CCPs and their users. We welcome the opportunity to contribute to this by offering our views on how these measures can be further strengthened.

SIX x-clear AG is incorporated in Zürich Switzerland, operates a branch in Oslo, Norway, and is a fully owned subsidiary of the SIX Group. The latter comprises the following regulated businesses: Swiss Stock Exchange, the Swiss CSD (SIS), the Swiss RTGS system for CHF (SIC), and the Swiss Trade Repository. SIX also encompasses a financial information/Data business and a FinTech-innovation centre.

SIX x-clear AG is regulated by the Swiss Financial Regulator, FINMA, as well as the Swiss National Bank (SNB), and is recognised by ESMA to provide services into the EU/EEA.

SIX x-clear AG offers Central CounterParty (CCP) clearing services covering an extensive number of European instruments (equities, exchange traded funds (ETFs) and equity derivatives) across a large range of European trading venues. As a CCP it helps strengthen utilisation of financial market liquidity and reduces credit risk. It achieves this by stepping in as intermediary between trading counterparties, netting their exposures and trades and securing the outstanding residual risk by taking appropriate high quality liquid assets as collateral.

The clearing services are provided in a large range of European currencies (e.g. CHF, DKK, EUR, GBP, SEK and NOK) as well as US Dollars. Settlement is performed in an equally wide range of European securities settlement and payment systems, with collateral in a range of Central Securities Depositories (CSDs), and payment systems.

SIX x-clear AG provides clearing services across a broad set of European instruments, for a large number of European-based Members, and 85% of our volumes originate from the EU. As a Third Country CCP (TC CCP), active in these European markets (i.e. EU, Norway and Switzerland), we understand the importance of a robust oversight framework.

SIX x-clear AG has interoperability arrangements with two other EU CCPs: LCH Ltd (UK) and EuroCCP (NL). This provides users with a choice of CCP and enables competitive conditions for clearing services. This has led to lower clearing costs, market dynamism and enhanced financial market resilience (through substitutability).

The peer-to-peer interoperability model is used for cash-equities and ETFs, and are all bilateral arrangements supported by asset class specific default waterfalls. It should be noted that that the interoperability arrangement for equity derivatives will cease from December 2019. These links are approved by the relevant national competent authorities on all sides, and residual risks are secured through additional prefinanced collateral. Some 50% of the EU/EEA/Swiss cleared transactions now flow across such interoperability arrangements, and about 75% of the total European trade venues are now open to competitive clearing. As a result of the clearing choice given to financial institutions, and their desire to embrace this choice, it is vital that providers of such services are able to operate on a level playing field, under equal conditions, so to avoid any distortion in market dynamics which could damage the competitive landscape. As a result of this we believe equal treatment should form part of any oversight assessment of systemic criticality, not just of any single CCP but of all such entities in unison.

Equities issuance and trading, and subsequent finality through clearing and settlement, is an essential component of a sound and vibrant economy. As the costs for accessing these have gone down over the years, to the benefit of those wishing to raise funds or seek returns on investment, the margins for suppliers have been sharply compressed for this asset segment. Simultaneously the regulatory compliance costs have risen significantly, and for CCP entities with turnover in the range of EUR 20 – 30 mio p.a. (such as for SIX x-clear and its primary competitors) additional costs at the levels envisaged in these consultations, can become an existential issue. We therefore strongly recommend that fees and charges be assessed by clearing segment and proportionate to CCP operating income (stemming from EU activities).

ESMA should also be cognisant of the fact that third country national competent authorities may also take note of the processes proposed and levels of fees suggested in these consultations. As a result they may seek to adjust their own regimes to reflect the increased level of oversight necessary and adjust the fee levels accordingly. It should not be forgotten that EU CCPs also operate in third country jurisdictions. We would expect third country national competent authorities to be reciprocally engaged (in any collective activities by authorities), and potentially apply similar tiering, charging and equivalence assessment regimes.

We take our operating mandate and license extremely seriously given the systemic nature of our business activities, the parties and values involved, and the impact our services have on the efficient operation of financial markets. We sincerely hope our feedback is assessed, together with those of our peers, and we remain available to engage with you to explore these options further, in the interest of well-functioning European financial markets.

<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>

The proposed fee structure seems very comprehensive and significantly higher than other jurisdictions. The tiering assessments for systemic criticality and for the comprehensive compliance assessment are initially self-assessments, following on from the EMIR prescribed country equivalence and ESMA recognition processes (which also incur costs). As such these charges display barriers to entry and to exit characteristics for TC CCPs serving the EU markets. Apart from reflecting the costs of the authorities’ work for reviewing the applications, it is rational that the charges levied are in proportion to the potential revenues streams and returns in the clearing activity to be undertaken. A pivot to a level of increased recognition and oversight fees that are significantly higher, potentially jeopardizes TC CCPs’ business models and introduces a business risk which would appear to be contrary of the intention of this legislation. A benchmarking exercise may be helpful in finding an appropriate base level and this should be conducted at product segment level as the outputs are likely to differ across the different types of business conducted.

Where TC CCPs and EU CCPs compete for the same business (either for members, flows, trade venues coverage, high quality collateral and settlement network access) in low margin activity areas such as equities clearing, such differences can seriously impact the competitive landscape and have multiple unintended consequences.

<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>

See our answer to question 1 and introductory remarks.

<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>

Yes, we agree, although the step-up is very steep.

<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>

The budget for the calendar year 2019 was set in 2018, and to “retroactively” impose additional oversight charges, upsets all such orderly financial planning. We welcome predictable, proportionate oversight charges, coupled with highly efficient oversight approaches which acknowledge the business revenues available in the market.

<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>

We would expect oversight capacity to be aligned to the number, size and product scope of the entities they are set to oversee, in particular the size of activity in the EU with consideration of the most efficient ways to exercise such oversight. It could be reasonable to factor in entities with more complex business models or with significantly more complex financial products if a different manner to those with more simpler structure/products. Leveraging technological advances, it should be possible develop more precise and effective supervisory approach over time, which in turn should be reflected in cost reductions for the oversight activities.

The proposed TC CCP regime is in addition to the oversight exercised by the TC CCP national regulators, as well as any other TC regulators or international bodies (such as Crisis Management Colleges, Interoperating CCP joint oversight roundtables and the related reporting to a range of government bodies, including trade repositories and settlement finality designating authorities).

<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>

The assessment of comparable compliance appears subjective as there is no quantitative detail on what and how this is conducted and how determinations may be fully or partially met. Arguably, those TC CCP which have comparable compliance would require much less active oversight from ESMA and the discount layers should be higher than currently suggested. However, the use of tiering of fees in this context also creates an operational environment which dislocates a level playing field of CCP operators and the subsequent operational fees the CCP may ultimately levy towards their users. This could have unintended consequences to market operation and market stability of the CCP operators, which likely is not the intent of this process.

<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>

Also see our answer to question 5

<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>

See our answer to question 10

<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>

See our answer to question 5.

<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>

See also our introductory remarks and answer to question 1.

Equities trading and clearing margins have been significantly compressed over the last few years resulting in limited net results. We strongly advocate that oversight charges must be proportionate to the EU portion of revenues and net returns of the CCP assessed, but also relative to the revenue pool of all CCPs active in the asset class in question.

There are now some 33 TC CCPs licensed in the EU, as far as we are aware, and some 16 EU licensed CCPs. Of these only 11 are active in the cash equities and ETF segments. Some are quite small entities whilst for others this is one asset class cleared alongside one or more derivatives segments.

Given the uncertainty on the number of Tier 1 and 2 CCPs, and the difficulty to assess ex ante how many there are likely to be in any coming period, it is impossible to draw up an effective business case for providing clearing services to the EU for any TC CCP with this model.

We would expect that the EU aspires to be a part of a global open financial market, allowing EU entities access to the most liquid trade venues and the associated most diversified and efficient CCPs which necessitates a process which does not unduly create barriers to entry (and exit) and promotes sound risk and operational pre-eminence. We would suggest aligning the annual charges to proportionate international levels and apply the most efficient entity and market oversight models available whilst being cognisant of TC national oversight.

<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>

The operating income (as per banking accounting) stemming from the cleared values and volumes of EU issued instruments, traded on EU venues, for the segment in question would be, in our view, the most appropriate benchmark for any additional supervisory charges. Acknowledgement that these are additional fees on top of the supervisory charges paid to the TC CCP’s national competent authority and to any other authority in which it operates, should also be a relevant factor in such an assessment.

Where CCPs interoperate (compete) with one another, such as in the equities & ETF segments, it would distort competition conditions if entities clearing the same segments would be confronted with very different oversight charges which are not in proportion to their revenue and business activities and which may be also be different to similar providers who are assessed differently. Oversight fees which are not aligned to the realities of the business conducted and the returns generated are simply impracticable and unsustainable.

<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>

We do not see withdrawal charges in other jurisdictions, and fail to see why the EU wishes to apply such exit hurdles.

Furthermore, where a CCP is under duress, possibly entering recovery or even resolution, such an additional charge is likely to more convoluted and will add to an already complex situation which may not be in the interests of investors.

<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>

Aligning to several other jurisdictions could be prudent. It would seem reasonable if the initial recognition fee is split in instalments which would allow for a pay-as-you-go system which limit losses for the venture if the initial assessment reveals that the business case would be unviable due to the costs involved.

<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>

A comparable compliance assessment comes in addition to the initial country equivalence assessment. For this initial assessment the TC CCP will often contribute and finance this activity.

The size of the levy seems very high, and the process heavy given the information that ESMA should already have at its disposal, and already have had a chance to assess.

<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>

In some jurisdictions the application charge is only levied upon receiving an operating license (or recognition). An alternative to applying this in full is to split the application fees in two or more parts.

If, during the application process conditions change, which maybe outside the control of the operator, it would seem unreasonable if the full fees are charged, especially where only a part of the processes is fulfilled.

<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>

Similar to some other jurisdictions it would seem more logical and timely to invoice in the 1st quarter of any year, once the preceding (and reasonably current) year’s audited annual accounts of the TC CCPs are available for establishing the revenue and net returns proportionate charges. This all the more so, as there are separate intra-year fees for tiering assessments, comparable compliance assessments, and withdrawal fees.

<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>

See our answer to question 12.

<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>

Note that the budgeting for 2019 is already done, and that for 2020 will be established in the Q3 2019. In order for an orderly and predictable budgeting of oversight and access costs, such fee schedules should be formally announced with consideration of budgetary norms.

<ESMA\_QUESTION\_TCTC\_18>