



European Securities and  
Markets Authority

# Final Report

**Technical advice on ESMA fees for Third-Country CCPs under EMIR 2.2**





European Securities and  
Markets Authority

11 November 2019  
ESMA70-151-2650

## Table of Contents

Executive Summary .....	4
1 Background.....	6
2 General aspects of the feedback to the fees proposals .....	7
3 ESMA’s budgeting model and management of EC advancement.....	9
4 ESMA’s activities and estimated costs under EMIR 2.2.....	11
5 Other authorities’ CCP supervisory fees .....	16
6 Assessment of specific feedback and final proposals .....	18
6.1 Initial recognition fees under EMIR 2.2. for TC-CCPs (i) that are not yet recognised or (ii) that change tier .....	18
6.2 Fees in 2019 for recognised or applicant TC-CCPs.....	20
6.3 Fees in 2020 and until end of transition period for recognised or applicant TC-CCPs in 2020.....	21
6.4 Comparable compliance.....	22
6.5 First-year fee following initial recognition .....	24
6.6 Annual fees .....	25
6.6.1 Introduction .....	25
6.6.2 Annual fees for Tier 1 TC CCPs .....	26
6.6.3 Annual fees for Tier 2 TC-CCPs.....	27
6.7 Fees for withdrawal of TC-CCP recognition.....	28
6.8 Payment and reimbursement conditions under EMIR 2.2.....	29
6.8.1 Fees for initial recognition and for application of comparable compliance.....	29
6.8.2 No reimbursement of fees in case of withdrawal of application by a TC-CCP before ESMA’s recognition .....	31
6.8.3 Annual fees .....	31
6.8.4 Withdrawal of recognition .....	32
6.8.5 2019 and 2020 TC-CCP fees .....	32
7 Annex.....	33
7.1 Annex I.....	33

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## Executive Summary

### Reasons for publication

On 13 March 2019, the European Parliament, the Council and the Commission reached a political agreement on the review of the regulatory framework for the authorisation and supervision of CCPs established in Title III of Regulation 648/2012 (EMIR 2.2). While the legislative process for the adoption of the proposed regulation amending EMIR in this respect was in the final stages, ESMA initiated its preparatory work for the implementation of the new regime for third-country CCPs (TC-CCPs).

Under the new regime the Commission (EC) has to adopt a delegated act on the fees to be charged to TC-CCPs. ESMA received a provisional mandate on 3 May 2019 to provide technical advice for the development of the corresponding Delegated Act, on the basis of which ESMA ran a consultation, and on 30 October 2019 the mandate was confirmed (see Annex).

This final report presents ESMA's technical advice to the EC on the fees to be charged to TC-CCPs in relation to the competences defined under EMIR as amended by EMIR 2.2. and following the assessment of feedback to the proposals included in the consultation paper.

### Contents

This final report is comprised of six major sections and an annex. Section 1 includes the background and the agreed text of EMIR 2.2. with regards to fees to TC-CCPs. Section 2 summarises succinctly the feedback received to the consultation paper and responds to the more general points raised by respondents. Section 3 includes the ESMA's applicable budgeting approach and the way ESMA's budget is determined. Section 4 provide information on the main activities that ESMA will need to carry out and the relevant high-level costs in terms of FTEs for the supervision of TC-CCPs.

To facilitate benchmarking of the ESMA's proposals to the EC Section 5 includes information on the fees charged by EU and TC authorities for the authorisation/registration, recognition and supervision of CCPs. Sections 6 includes the assessment of the feedback received on the specific proposals that were consulted and each of the eight subsections contains the way forward following the assessment of the feedback. The first subsection includes the change in the fee for initial recognition of TC-CCPs to specify that each TC-CCP would pay a first fee to process its application and in case it is determined to be Tier 2, an additional one. Subsections 2 and 3 specify the approach for 2019 and 2020 fees, respectively. Subsection 4 details how comparable compliance will be reflected in the fees and the discount to the initial recognition fee if the TC-CCP applies for comparable compliance before it is recognised. Subsection 5 outlines the approach for the first-year fee. Subsection 6 sets out the framework for the calculation of annual fees and their dependence on other fees charged by ESMA in the context of EMIR 2.2. Subsection 7 presents the removal of the proposed fee

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in the case of full withdrawal of recognition of a TC-CCP. Subsection 8 provides the conditions for payment and reimbursement of fees. Annex I contains the mandate received from the European Commission.

### **Next Steps**

ESMA will publish the final report and will submit its advice to the European Commission.

# 1 Background

1. On 13 June 2017, the European Commission (EC) published a proposal for the amendment of EMIR and the ESMA Regulation (EMIR 2.2 proposal). The objective of the proposal was that “the EU equips its Capital Markets Union with a more effective and consistent supervisory system for CCPs, in the interest of further market integration, financial stability and a level playing field.”
2. On 13 March 2019, the European Parliament, the Council and the Commission reached a political agreement on the review of the regulatory framework for the authorisation and supervision of CCPs established in Title III of Regulation 648/2012 (EMIR2.2<sup>1</sup>, hereinafter). While the legislative process for the adoption of the proposed regulation amending EMIR in this respect is being finalised, ESMA has initiated its preparatory work for the implementation of the new regime for third-country CCPs (TC-CCPs).
3. Given the growing importance of CCPs in the financial system and the global increase in clearing and concentration of risks in a limited number of global CCPs, the framework for recognition and supervision of TC-CCPs has been enhanced with the introduction of EMIR2.2. In particular, a two-tier system for TC-CCPs based on their systemic importance has been introduced. Where a TC-CCP is determined systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States, such TC-CCP will be considered a Tier 2 third-country CCP (Tier 2 TC-CCP) by ESMA in accordance with Article 25(2a) of EMIR2.2. A TC-CCP that has not been determined as systemically important or likely to become systemically important for the Union or for one or more of the Member States is referred to in this document as a Tier 1 third-country CCP (Tier 1 TC-CCP).
4. In particular, the amendments establish within the EU exclusive supervisory competences for ESMA for Tier 2 TC-CCPs. In accordance with recital (45) of EMIR 2.2, in order to enable ESMA to conduct its tasks with regards to TC-CCPs effectively, TC-CCPs should pay fees for ESMA's supervisory and administrative tasks. In this regard, paragraphs 1 and 2 of Article 25d provides that

*“1. ESMA shall charge the following fees to CCPs established in a third country in accordance with this Regulation and in accordance with the delegated act adopted pursuant to paragraph 3:*

*(a) fees associated with applications for recognition pursuant to Article 25;*

*(b) annual fees associated with ESMA's tasks in accordance with this Regulation in relation to the CCPs recognised in accordance with Article 25.*

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<sup>1 1</sup> Regulation (EU) 2019/... of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, which was adopted by the European Parliament and the Council on 15 October 2019 and the final act was signed into law on 23 October 2019 – see <https://data.consilium.europa.eu/doc/document/PE-88-2019-REV-1/en/pdf>. It is soon to be published in the EU Official Journal.

*2. The fees referred to in paragraph 1 shall be proportionate to the turnover of the CCP concerned and shall cover all costs incurred by ESMA for the recognition and to the performance of its tasks in accordance with this Regulation.”*

5. Furthermore, paragraph 3 of Article 25d provides that:

“3. The Commission shall adopt a delegated act in accordance with Article 82 in order to further specify the following:

- (a) the types of fees;
- (b) the matters for which fees are due;
- (c) the amount of the fees;
- (d) the manner in which fees are to be paid by the following:
  - (i) a CCP which applies for recognition;
  - (ii) a recognised CCP classified as a Tier 1 CCP in accordance with Article 25(2);
  - (iii) a recognised CCP classified as a Tier 2 CCP in accordance with Article 25(2b).

6. ESMA was mandated by the Commission to provide technical advice on the possible content of this delegated act which is enclosed in Annex I in this paper.
7. Considering the adopted framework for the supervision of TC-CCPs and along with the assessment of the feedback to each specific question and topic, this final report sets out ESMA’s technical advice to the EC with regards to the fees related to the ESMA’s work for the recognition and supervision of TC-CCPs under EMIR 2.2.
8. It is worth noting that ESMA has been in charge of the recognition of TC-CCPs since the entry into force of EMIR. However, tasks related to TC-CCPs were supported by the regular ESMA budget and not by specific fees charged to the TC-CCPs.

## **2 General aspects of the feedback to the fees proposals**

9. ESMA received a total of 14 responses to the consultation paper, 5 of which were marked as confidential by their submitters.
10. Some of the respondents have criticised the actual principle of collecting fees from supervised entities. While in some jurisdictions, the funding of public agencies and specifically the supervision of financial market participants follows a model of indirect appropriations of a government budget, usually in the European Union the activities of the supervisors of the financial markets are financed directly by the supervised entities. This way, the burden to taxpayers not using these services is avoided, and only the providers and the users of these services are taxed. These respondents did not provide

any practical arguments on the actual fee proposals; hence their feedback is limited to this general comment. Moreover, as mentioned in the previous section, the EMIR 2.2 includes a specific empowerment for the European Commission to define applicable fees for TC-CCPs. Therefore, there is a robust legal basis supporting the proposed fee model. In practical terms, it is worth mentioning that EMIR 2.2. is not the first legal framework to establish fees payable to ESMA from third country entities. At this stage, certified TC-CRAs are paying annual supervisory fees to ESMA and when there are recognised TC-TRs those would also need to pay annual supervisory fees.

11. Another general aspect that was mentioned relates to the level of fees and the need to align them (and respectively the number of staff) to those charged to third country entities by supervisors from other jurisdictions or those charged by EU NCAs to EU CCPs. For the purpose of transparency, ESMA has included in the relevant sections information that was found from the webpages of the authorities. While ESMA understands that from TC-CCPs' perspective such comparison seems understandable, ESMA also notes that neither the regulatory and supervisory framework of those jurisdictions, nor the costing model of the supervisory agencies, or the relevant marketplace are the same as the EU. Therefore, there should be careful analysis of those comparisons to avoid drawing flawed conclusions.
12. Moreover, some respondents adduced the existence of a potential conflict of interest whereby ESMA might condition the outcomes of its tiering process for TC-CCPs on its staff needs and perceived regulatory expansion. The process however is the inverse. As explained in Sections 2 and 3 of the consultation paper, ESMA determines on an annual basis its budget needs (incl. staff, systems, premises) depending on the expected level of activity, in that case the number of TC-CCPs that are deemed to be either Tier 1 or Tier 2. As EMIR 2.2. establishes a significantly more intensive and extensive supervision of Tier 2 TC-CCPs compared with Tier 1 TC-CCPs, ESMA will take this into account when planning its resources for the forthcoming budgetary year. Moreover, the fact that the ESMA's budget is audited on a yearly basis by the European Court of Auditors will act as a control mechanism against any potential conflicts. In this respect it is worth noting that ESMA will not finance its growth by changing TC-CCPs. It will only charge them fees for the activity directly related to the supervision of TC-CCPs, which will require additional resources to be planned according to the budget principles explained in section 3.
13. A related general point relates to the simplification and heightening the transparency of the fee determination process. Firstly, as explained in paragraph 25 of the following section ESMA aspires to establish a very simplified process on the determination of fees. Secondly, ESMA wants to rule out any concern regarding the transparency of determination of its supervisory budget. ESMA is a public authority and as such its budget is subject to the highest levels of scrutiny. Moreover, ESMA does not have among its stated objectives the maximisation of fees received from supervised entities nor the expansion of its staff. As indicated in paragraphs 22 and 23, the approval of the budget follows a preestablished procedure following the EU financial regulation and then the correct implementation of the revenue budget is checked on a yearly basis by the European Court of Auditors.

14. As a related matter the need for the predictability of fees was brought to ESMA's attention by the CP respondents. This aspect is indeed addressed by (i) ESMA's proposal to charge fees in advance of the supervisory year and (ii) the publication of the supervisory budget by the end of September of the year previous to the supervisory year. This
15. The notion of proportionality has also been raised by respondents. It was tackled from the two perspectives – general proportionality of fees and proportionality of fees in comparison with the home supervisor fees. The general proportionality of fees is also enshrined in the legal empowerment under EMIR 2.2. and as such ESMA is satisfying it through the establishment of specific one-off recognition fees for Tier 1 and for Tier 2 TC-CCPs and distinct annual fees for recognised Tier 1 and Tier 2 TC-CCPs. It is considered that distinguishing supervisory fees across Tier 2 TC-CCPs will not make the proposal more proportionate, as explained in section 6.6.3. This is linked to the level of systemic importance in the EU, the difficulty in establishing an efficient way to measure the turnover (revenues are not the only measure and the activity metrics are usually error-prone) and the similarity in supervisory effort towards the Tier 2 TC-CCPs. The proportionality with the home supervisor fees is addressed in paragraph 11 and section 5.
16. Another general point made by the respondents related to the purpose of seeking recognition – (i) either offer clearing services to EU clearing members or (ii) obtain beneficial treatment under CRR. While ESMA coincides that these could be reasons to seeking recognition, ESMA understands that in either case there will be a level of supervisory cost that will be incurred through the supervision by ESMA of the TC-CCP. This cost is linked to the systemic nature of the TC-CCP for the EU not to the reason for which that TC-CCP applied.
17. Finally, respondents also acknowledged the comprehensiveness of the fee schedule proposal, while requiring further recalibration and lowering of the fees. The last aspect has been considered and ESMA has included several changes in this regard – (i) reduction in the total initial recognition fee when combined with request for comparable compliance; (ii) inclusion of two levels of discounts to annual fees when comparable compliance is applied and (iii) removal of withdrawal of recognition fees.

### **3 ESMA's budgeting model and management of EC advancement**

18. In order to enable ESMA to conduct its tasks related to TC-CCPs effectively as well as to ensure an efficient use of ESMA's budget, it is necessary that TC-CCPs, private sector entities with a profitmaking objective, cover all costs of doing business, including the costs related to ESMA's recognition and supervision of TC-CCPs.
19. ESMA applies a universal budgeting approach, which means that income from fees is treated as general revenue. This is in line with the standard practice of other partially funded EU agencies, as recommended by DG Budget of the EC.

20. ESMA prepares its annual budget aiming at balancing income through fees with the incurred expenditure, understanding that deficits or surpluses are to be balanced by the rest of ESMA's income sources. The total amount of ESMA's annual revenues is defined based on ESMA's Activity-Based Management methodology. ESMA assesses on an annual basis its budget, which comprises not only the number of staff members needed to perform a given task, but also the related logistics, IT, communications and general costs. This structure is developed consistently with the ESMA fee regulations for TRs<sup>2</sup> and CRAs<sup>3</sup>.
21. In case of deficits (ESMA collecting less than incurred), ESMA does not recover the deficit from the supervised entities. If the deficit is repeated or significant, ESMA should analyse the reasons why it happened, drawing up lessons for the next budgeting period. For surpluses (ESMA collecting more than incurred) the same reasoning should be followed. Hence, no excess of fees is paid back to the supervised entities. This mechanism is already in place at ESMA for credit rating agencies (CRAs) and also for trade repositories (TRs) under EMIR<sup>4</sup> (ESMA fee regulations). In this regard it is worth noting that given the annual character of the budget, ESMA will, at all times, be in possession of the relevant information to ensure alignment between the costs incurred and the fees to be paid by supervised entities. Moreover, some of the supervisory activities are horizontal, i.e. they cover all the supervised entities and in at case it is very difficult to allocate specific costs to one entity, except if drivers for allocation of indirect costs are used.
22. The existing mechanisms in place (EU budgetary procedure, annual reporting, single programming document), and the required approval by the ESMA's Management Board and Board of Supervisors, facilitate the transparency of the budgeting process and ensure an appropriate level of internal controls. Moreover, ESMA has implemented an activity-based budgeting and an activity-based costing models in order not only to plan its budget, but also to accurately calculate and control the cost of each of its activities.
23. Furthermore, on a yearly basis, the correct implementation of ESMA's budget, and in particular of the fee-funded budget, versus the EU Financial Regulation, is audited by the European Court of Auditors. The final audit report is communicated to the European Parliament and Council, as part of the European Parliament's discharge of ESMA's annual accounts.
24. In terms of predictability, the total amount of the estimated costs is presented together with the ESMA's annual work programme in September of the year N-1, and the approved budget is published on ESMA's website and in the Official Journal of the EU in the beginning of the year N.
25. In addition, ESMA has been requested by the Internal Audit Service of the EC to further simplify and harmonise, to the extent feasible, its fee models. Therefore, in this final

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<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:279:0004:0009:EN:PDF>

<sup>3</sup> <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:090:0006:0010:EN:PDF>

<sup>4</sup> In the case of TRs it is also proposed to follow the same model under SFTR and under Securitisation Regulation.

technical advice, ESMA is putting together fee proposals that are in line with this general objective.

26. Furthermore, ESMA aims also at collecting fees by the start of a calendar year to ensure the availability of resources for its activities. The reason for this is that, at this stage, ESMA is not allowed to keep reserves from revenues from previous years. The determination of fees needs to be based on the latest available information. More detailed information on the payment and reimbursement conditions is specified in section 6.8.
27. Finally, to facilitate the set-up of ESMA's new tasks with regards to TC-CCPs, the EC has foreseen an advancement of ESMA's fee revenues for 2019 (€1,045,000) and 2020 (€5,346,000) representing maximum amounts available in order to cover ESMA's overall cost for TC-CCP for these two years (including preparatory work). As a result, any amount advanced by the EC to cover ESMA's yearly costs in relation to TC-CCPs and that is not covered by corresponding fees for that period will need to be recovered in the years 2022 and 2023. These costs will be distributed across the years in which they need to be returned to the EC. This is a one-off situation and constitutes a deviation from the general framework under which ESMA's fees, revenues, and costs operate.

ESMA establishes a harmonised framework for dealing with surpluses and deficits and for treating the annual fees under both EMIR 2.2 as general revenue as follows:

- a. In case of deficits (ESMA collects less than incurred), ESMA does not recover the deficit from TC-CCPs.
- b. In case of surpluses (ESMA collects more than incurred), ESMA does not pay back the surplus to TC-CCPs.
- c. Fees are to be paid by the end of the previous calendar year to the one for which fees are due to ensure availability of resources for the performance of ESMA's tasks.

By way of derogation to the previous paragraph, in relation to the period 2019-2020 for which an advancement from the European Commission will be given to ESMA, ESMA will balance any surplus or deficit in TC-CCP budget with the 2021-2023 TC-CCP budgets. ESMA will allocate the relevant costs proportionately to Tier 1 and Tier 2 TC-CCPs.

## 4 ESMA's activities and estimated costs under EMIR 2.2

28. In the revised Legislative Financial Statement accompanying EMIR 2.2, the EC has included an extensive assessment of the objectives, tasks and resources needed by ESMA under EMIR 2.2. Based on this assessment, the fees to be paid by TC-CCP should cover the costs of up to 49 full-time equivalent staff members (FTEs), carrying out the tasks under the Regulation, including the necessary horizontal functions, and the three independent members of the Supervisory Committee in the steady state of implementation of EMIR 2.2. Under this assumption, the TC-CCP maximum budget in the steady state is around 8-9 million EUR, including, among others, initial recognition,

application of comparable compliance and supervision of TC-CCPs. This figure is in line with the 2019 ESMA supervisory budget for CRAs. However, at this stage it is not possible to forecast if and when this steady state will be reached, as this will depend on the number of Tier 2 CCPs and of TC-CCPs in total and on the effective cost of the supervisory activity carried out on TC-CCPs.

29. Once the delegated act under Article 25(2a) of EMIR become applicable, ESMA will be empowered to perform a tiering of the TC-CCPs, in order for them to be classified as Tier 1 TC-CCPs or Tier 2 TC-CCPs. To carry out the tiering of TC-CCPs, ESMA will need to collect, process and assess an important amount of information needed to classify the entities as either Tier 1 or Tier 2 in the recognition process laid down in EMIR 2.2. These costs will be covered by either a one-off initial recognition fee for new applicants, the relevant 2019 and 2020 fees, the fees payable by TC-CCPs whose currently suspended applications are unsuspended or entities that become Tier 2 TC-CCPs, or by the annual fees applicable both to Tier 1 and Tier 2 TC-CCP.
30. Some of the ESMA activities will be one-off activities and will take place in the early years of the entry into force of EMIR 2.2. The tiering for TC-CCPs already recognised under the current EMIR should be completed within 18 months after the entry into force of the delegated act on tiering according to Article 89(3c). The rest will be completed on an ongoing basis in accordance with a frequency indicated in EMIR 2.2.
31. The detail and amount of information to be handled for recognition and on-going tasks with respect to TC-CCPs will be different, thus different levels of fees linked to the respective activities are established.
32. Although Tier 1 TC-CCPs may not be considered as systemically important, under EMIR 2.2 at the time of tiering, ESMA is required to review regularly their systemic importance. Therefore, even if an entity would not qualify as Tier 2 TC-CCP, there will be costs attached to the tasks to be performed under EMIR 2.2 and the periodic assessment of systemic relevance.
33. To sum up, activities with regards to the TC-CCPs include, among others, the following tasks:
  - a. ongoing supervision of Tier 2 TC-CCPs, consisting of but not limited to: monitoring of the ongoing compliance with EMIR requirements, through requests for information, investigations and on-site inspection, day-to-day contact (physical meetings, conference calls, etc) with CCP management, compliance, legal, IT, risk management, financial, business and operations teams; assessment of risk models, CCP rulebook and procedures, board and executive staff appointments, outsourced services, extension of activities and services, IT solutions, capital adequacy, CCP's shareholders / shareholding structure, and interoperability arrangements; review of internal audits; comprehensive risk assessment; issuance of recommendations and crisis management; risk analysis and modelling; legal analysis and support; bilateral and multilateral meetings with stakeholders, in particular TC-CCPs and trading venues as well as with other regulators or supervisors, therefore requiring frequent travels;

- b. assessment of comparable compliance of Tier 2 TC- CCPs;
  - c. performance of stress tests for Tier 2 TC-CCPs;
  - d. establishment and management of a TC-CCP college;
  - e. adequate information exchange between the ESMA Supervisory Committee and the TC-CCP College;
  - f. effective cooperation with central banks of issue and the ESRB on relevant matters: and
  - g. performance of impact assessment underlying a potential recommendation to deny recognition to a third-country CCP.
34. Further to these activities, ESMA will also need to update the MoU with the relevant third-country competent authority(ies) and monitor the regulatory and supervisory developments in third countries for which equivalence decisions have been adopted by the EC.
35. Finally, when ESMA carries out its tasks, support staff in the horizontal departments of ESMA, such as legal, resources management and cooperation is needed. While these areas are not directly involved in the supervision, they perform essential activities for the efficient and effective functioning of the organisation, an increase in their number is needed to better undertake the required new tasks. These resources are therefore considered when defining the annual budget.
36. In terms of costs per supervisory and administrative activities that ESMA will need to perform vis-à-vis TC-CCPs, and leaving aside the IT systems to support the supervision, the following ones are included in EMIR as amended by EMIR 2.2:

Activities related to Tier 1 TC-CCPs	Type of activity	Estimated number of FTEs/TC-CCP
Receipt of applications for recognition and assessment of available information for tiering*		
(i) Review of recognition decisions adopted prior to EMIR 2.2's entry into force, including tiering, in accordance with Article 89(3c);	One-off	0,05 FTE
(ii) where a TC-CCP intends to extend or reduce the range of its activities and services in the Union;	One -off	0,05 FTE
(iii) in any case at least every five years, in accordance with Article 25(5);	Periodic	0,05 FTE

Activities related to Tier 1 TC-CCPs	Type of activity	Estimated number of FTEs/TC-CCP
Performance of tiering and determination of applicable tier in accordance with Article 25(2a) <sup>5</sup>	Periodic	0,15 FTE
Recognition* of Tier 1 TC-CCP under EMIR 2.2 in accordance with paragraph (2) of Article 25;	Periodic	0,05 FTE
Annual on-going and regular assessment of compliance with EMIR by Tier 1 TC-CCPs;	On-going	0,1 FTE

Activities related to Tier 2 TC-CCPs	Type of activity	Estimated number of FTEs/TC-CCP
Receipt of applications for recognition and assessment of available information for tiering*		
(i) Review of recognition decisions adopted prior to EMIR 2.2's entry into force, including tiering, in accordance with Article 89(3c);	One-off	0,05 FTE
(ii) where a TC-CCP intends to extend or reduce the range of its activities and services in the Union;	One -off	0,05 FTE
(iii) in any case at least every five years, in accordance with Article 25(5);	Periodic	0,05 FTE
Performance of tiering and determination of applicable tier in accordance with Article 25(2a) <sup>6</sup>	Periodic	0,15 FTE
Request of additional information* to Tier 2 TC-CCPs to assess completeness and compliance	Periodic	1,5 FTE
Request of additional information* to Tier 2 TC-CCPs to assess completeness and compliance (comparable compliance included)	Periodic	0,5 FTE

<sup>5</sup> \*It refers to either initial recognition or a review of recognition.

<sup>6</sup> \*It refers to either initial recognition or a review of recognition.

Activities related to Tier 2 TC-CCPs	Type of activity	Estimated number of FTEs/TC-CCP
Recognition* of Tier 2 TC-CCP under EMIR 2.2 in accordance with paragraphs (2), and (2b) and (2c) of Article 25;	Periodic	0,5 FTE
Annual on-going and regular assessment of compliance with EMIR by Tier 2 TC-CCPs, including the conditions for recognition for Tier 2 TC-CCPs in accordance with Article 25b;	On-going	0,1 FTE
Ongoing supervision of recognised Tier 2 TC-CCPs, including on-site inspections to Tier 2 TC-CCPs, including assessment of partial or full withdrawal of recognition;	On-going	3-4 <sup>7</sup> FTE

Activities related to all TC-CCPs	Type of activity	Estimated number of FTEs/TC-CCP
Conclusion and maintenance of cooperation arrangements with third-country authorities in accordance with Article 25(7) and monitoring of the regulatory and supervisory developments in third countries in accordance with Article 25(6b);	One-off	0,125 FTE
Information exchange with third-country authorities in accordance with Article 25(7)	On-going	0,25 FTE

37. The FTE figures for Tier 1 TC-CCPs are comparable with the figures on TC-CCP included in the Report on staffing and resources<sup>8</sup>.
38. The proposed amounts of fees in the subsequent sections therefore cover the cost estimates related to (i) average FTE cost including support staff (e.g. staff in support areas such as legal, resources, corporate affairs), (ii) allocation of the appropriate costs of the independent members of the Supervisory Committee, as well as (iii) impact of the associated costs for these staff relating to the extra office space, IT systems/applications, missions, training and others. The average FTE cost comprises the salary, pension contributions, staff management and recruitment costs, building rent and maintenance, facility management services, IT systems/applications/equipment, legal advice,

<sup>7</sup> The actual figure will depend on the application of comparable compliance

<sup>8</sup> <https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-874.pdf>, paragraph 32.

missions, translations and training, among others, indispensable for the performance of the duties of the relevant staff member.

39. As an example, a fee of 400,000 EUR (additional Tier 2 fee and comparable compliance) would comprise (i) the overall cost of 2 FTEs and (ii) the associated costs mentioned above (IT investments included). 2 FTE is equal to either two staff members working for one year or six staff members working for four months.

## 5 Other authorities' CCP supervisory fees

40. To provide greater level of transparency and to ensure the appropriate benchmarking with other authorities, ESMA includes in this final report a summary of the applicable fees in other EU Member States for the EU-CCPs<sup>9</sup>, as well as the fees charged by certain third country authorities to the local or third country CCPs operating in that jurisdiction. The table is compiled based on available public information. The figures are EUR equivalent.
41. As already indicated in paragraph 11, the analysis of these figures is not straightforward and requires a deeper assessment of the supervisory framework, the industry landscape and the authority's funding principles.
42. Below ESMA has included a comprehensive table with the amount that have been published by the relevant EU and TC supervisory authorities.

Authority	Type of entity	Authorisation	Recognition	Supervision	Specific administrative acts
<b>Third-country authorities</b>					
Ontario Securities Commission	CCP	6,843-74,745	-	6,795 - 197,095 depending on activities	Yes
Ontario Securities Commission	TC-CCP	-	6,843-74,745	6,795 - 197,095 depending on activities	Yes
Hong Kong Securities and Futures Commission	CCP	1,147	-	1,147	Yes
Hong Kong Securities and Futures Commission	TC-CCP	-	1,147		
Australian Securities and	CCP	around 2,500 depending on complexity	-	16,253 - 271,300 depending on the	Yes

<sup>9</sup> The supervision of TC-CCPs in the EU is assigned to ESMA

Authority	Type of entity	Authorisation	Recognition	Supervision	Specific administrative acts
Investments Commission				tier of the applicant	
FINMA (Swiss)	CCP	0	-	92,014 - 230,036 depending on CCP category plus a variable fee based on gross income	Yes
FINMA (Swiss)	TC CCP	-	0	92,014 - 230,036 depending on CCP category plus a variable fee based on gross income	Yes
Monetary Authority of Singapore	CCP	2,480	-	155,000 - 465,000 based on the cleared amounts	No
Monetary Authority of Singapore	TC CCP	-	6,200	155,000 - 465,000 based on the cleared amounts	
CFTC	CCP-TC CCP	0	0	0	No
<b>EU authorities</b>					
Consob	CCP	0	-	525,070	No
DNB	CCP	-	0	0,2% RW assets	No
BaFIN	CCP	39,000	-	from 50% to 100% of the authorisation fee	No
CNMV	CCP	20,482	-	25,502 - 71,407	Yes
Bank of England	CCP	5,503 - 330123 depending on tier	-	1,243,778- 2,179,200 depending on tier	No
AMF/ACPR	CCP	0	-	450,000 plus a 0.66% additional contribution tax	No
FMA	CCP	0	-	100,000	No

Authority	Type of entity	Authorisation	Recognition	Supervision	Specific administrative acts
HCMC	CCP	150,000	-	75,000 for annual renewal plus a biennial contribution of 7.5% of revenues	YES
KNF	CCP	4,500	-	5,5% of revenues. In 2018 it was EUR 371,579.29	YES
FI	CCP	6,300 - 820,000 based on categories	-	EUR 9,450 - 820,000	YES

Note: All amounts are in EUR. Where no specific amount is included in the relevant fee regulation, for illustrative and comparative purposes it is calculated by ESMA. In the case of TC authorities, ESMA did not find any special reference that the supervisory fees are due only by the local CCPs.

## 6 Assessment of specific feedback and final proposals

### 6.1 Initial recognition fees under EMIR 2.2. for TC-CCPs (i) that are not yet recognised or (ii) that change tier

43. As indicated in the CP, the initial recognition of TC-CCPs under EMIR 2.2. implies that certain activities are performed by ESMA. The MoUs with the relevant TC authorities may need to be updated and ESMA will need to collect, process and assess data from the TC-CCPs regarding their organisation, services and activities in order to perform the tiering of the TC-CCP, i.e. such TC-CCP is considered either as Tier 1 TC-CCP or as Tier 2 TC-CCP depending on if such TC-CCP is, or likely to become, systemically important.
44. The indicators to be used by ESMA in determining whether a TC-CCP is or is likely to be systemically important will be included in the delegated act adopted by EC under the last paragraph of Article 25(2a) of EMIR as amended by EMIR 2.2.
45. In the CP was further explained that ESMA shall, after conducting the assessment referred to in the first subparagraph of Article 25(2a) of EMIR as amended by EMIR 2.2, inform the applicant CCP whether it is considered a Tier 1 CCP or not within 30 working days of the determination that that CCP's application is complete, hence ESMA would proceed with the recognition of the CCPs, only when it has at its disposal complete information in view of the type of TC-CCP and has completed the process for tiering. Subsequently, once a TC-CCP is determined not to be a Tier 1 TC-CCP, ESMA will

request additional information in order to assess the TC-CCP's compliance with the corresponding conditions for recognition of Tier 2 TC-CCP. It is the incremental effort of this additional assessment the one that would require greater supervisory cost in terms of FTEs, use of horizontal services and IT systems. Therefore, while in general terms the feedback to the proposed Tier 2 TC-CCP fees was not positive, ESMA understands that the main reason for this was the misperception by the respondents that the cost of recognition of Tier 1 and Tier 2 TC-CCPs is the same. By no means ESMA would have pre-judged the levels of fees applicable to each entity.

46. With regards to the level of fees for Tier 1 TC-CCPs, a split feedback was received. The main supporters for lower or zero fees advocated that the proposed amounts are higher than those of other authorities. Furthermore, these respondents indicated that establishing fees would create barriers to entry for smaller TC-CCPs and might have an impact on the liquidity. While theoretically this reasoning might be correct, it should also be noted that in principle creating a registration framework also establishes a barrier to entry, same as the existence of certain recognition requirements, such as equivalence decisions.
47. Therefore, after having analysed the arguments provided as part of the feedback received and the FTEs expected to be dedicated to assessing an application for recognition and without taking comparable compliance into account, ESMA proposes the following fees:
  - a. Any TC-CCP applicant - one-off fee of 50,000 EUR covering the tiering and reduced costs of assessing an application for recognition of Tier 1 TC-CCP.
  - a. Additional fees of 300,000 EUR for TC-CCP that are deemed to be Tier 2. This fee will cover the costs of tiering and additional information to be assessed prior to the initial recognition is granted.
48. In the case of TC-CCPs whose application is suspended, they will not be subject to fees during the suspension. Once their application is not considered as suspended, they will become subject to the fees detailed in this section. The reason for this is that these entities would need to cover the costs for their assessment under EMIR 2.2.
49. Following the performance of the periodic tiering review of the TC-CCPs, it may be that a Tier 1 TC-CCP becomes a Tier 2 TC-CCP. In that case, ESMA proposed that the new Tier 2 TC-CCP would need to follow the process to be recognised as a Tier 2 TC-CCP. This would also mean an increased supervisory assessment and greater administrative effort towards that entity. To cater for these extra costs, the entity that becomes a Tier 2 TC-CCP will have to pay the difference between the Tier 2 TC-CCP fee and the Tier 1 TC-CCP fee. The feedback to this proposal was positive in general and supported an increase in the level of fees when an entity increases its systemic relevance in the EU. Some more technical aspects relating to the calculation of pro-rata extra fees were proposed. ESMA acknowledges this aspect, but in order to simplify the process of determination of fees, ESMA would suggest to not include any additional factoring in the fee calculation.

50. In the case, when a Tier 2 TC-CCP becomes Tier 1 TC-CCP, ESMA will not be reimbursing or giving back the one-off initial fee difference to that entity, as there has already been an increased supervisory and administrative effort towards that entity when it was determined to be Tier 2 TC-CCP. Instead, the Tier 1 TC-CCP fee will be applicable to that entity for the following year.
51. Finally, a Tier 2 TC-CCP may request the application of comparable compliance. This would require the existence of an EC delegated act declaring comparable compliance, which is further detailed under Section 6.4 of this final report.

ESMA proposes the following fees for initial recognition under EMIR 2.2. or for change of tier following review:

A. One-off fee of one-off fee of 50,000 EUR covering the tiering and reduced costs of assessing an application for recognition of Tier 1 TC-CCPs including cost of MoUs update and equivalence assessment, as applicable;

B. Additional fee of 300,000 EUR for T-CCPs that are deemed Tier 2 related to initial tiering, assessment of compliance with EMIR and recognition of TC-CCPs, including cost of MoUs update and equivalence assessment, if needed. This additional fee will be reduced to 150,000 EUR, in case the TC-CCP requests application of comparable compliance before it is recognised.

When a Tier 1 TC-CCP becomes Tier 2 TC-CCP, it should pay the difference between the two fees, as indicated in section 6.8.

ESMA proposes that each TC-CCPs whose application for recognition is suspended does not pay any fee during the suspension of the application.

## 6.2 Fees in 2019 for recognised or applicant TC-CCPs

52. It is expected that EMIR 2.2. will enter into force in Q4 2019. In the CP ESMA indicated that in order to cover the costs related to TC-CCPs, ESMA will charge in 2019 all TC-CCPs that are already recognised with a fee that will be proportionate to the Tier 1 TC-CCP annual fee weighted by the proportion of days in 2019 for which EMIR 2.2. is in force. All but one respondent referred to the entry into force of the delegated act on tiering as the starting point for charging fees to TC-CCPs. In addition, it was mentioned that most of the entities have already decided their budget for 2019 in 2018, hence any unforeseen charge would impact their financial planning.
53. In this respect it is worth mentioning that Article 25d(1)(b) EMIR, as amended by EMIR 2.2. provides that ESMA shall charge fees to TC-CCPs annual fees associated with ESMA's tasks in accordance with this Regulation in relation to the CCPs recognised in accordance with Article 25. Moreover, until the amendment of EMIR by EMIR 2.2., ESMA has been supervising TC-CCPs without charging them fees and financing this activity with its general budget, i.e. not performing other activities related to the supervision of

financial stability, and orderly markets in the EU. Moreover, these changes were known since the proposal was tabled (2017), so the risk of being charged fees could have been reflected in the TC-CCPs budgets. The triggering point for the legislation to take effect is its entry into force. The tiering delegated act is irrelevant for this proposal as all recognised CCPs will be charged as non-tiered, which is equivalent to the pro rata of a tier 1 fees, i.e. the minimum fee the TC-CCPs can be requested to pay. Following the tiering delegated act what it would change is that some CCPs might be considered Tier 2 and pay higher fees. Finally, the expected amounts to be paid by the TC-CCPs for 2019 are not substantial as to even remotely impact the budgets of the TC-CCPs. As a result, ESMA reiterates its technical advice to charge pro-rata fees in 2019.

ESMA proposes that each TC-CCP that is recognised at the time of entry into force of EMIR 2.2. pays the Tier 1 TC-CCP annual fee factored by the proportion of days for which EMIR 2.2. is in force in 2019.

### **6.3 Fees in 2020 and until end of transition period for recognised or applicant TC-CCPs in 2020**

54. ESMA mentioned in the CP that operationally-wise tiering could only be performed following the entry into force of the delegated acts on tiering and comparable compliance adopted by EC under the last paragraphs of Article 25(2a) and of Article 25a of EMIR as amended by EMIR 2.2. This is expected to take place in early 2020. In case the entry into force is delayed, ESMA proposed to keep the same approach as for 2019.
55. Therefore, ESMA proposed that for 2020 all TC-CCPs pay at least the annual fee applicable for Tier 1 TC-CCPs. This fee will include also the costs of performing the tiering. Once tiering is conducted it might result in a TC-CCP becoming Tier 2 TC-CCP.
56. The entities that are determined to be Tier 2 would need to be recognised as Tier 2 TC-CCPs following the steps indicated in paragraph 45 in the section for initial recognition. ESMA further proposed that The Tier 2 TC-CCP should then pay the difference between the Tier 1 TC-CCP one-off fee and the Tier 2 TC-CCP one-off fee, i.e. 300,000 EUR. In this way it will be ensured that there is a level playing field between new applicants that are determined Tier 2 and the already recognised TC-CCPs that following the performance of the tiering process are determined to be Tier 2 TC-CCPs.
57. The feedback on this point was similar to the one on the 2019 fees, i.e. fees should take as reference point the adoption of the delegated act on tiering and there should be a pro-rata payment for the days of supervision as Tier 2. ESMA reiterates a consistent approach to the one proposed in the previous sections, as it will increase predictability of fees and cover ESMA's costs. Therefore, before the delegated act on tiering all TC-CCPs are considered as non-tier 2 CCPs and pay the fee accordingly, i.e. the fee envisaged for Tier 1, which is the minimum fee included in the technical advice.

ESMA proposes that each TC-CCP that is recognised at the time of entry into force of EMIR 2.2. and where the review under Article 89(3c) has not yet been finalised, pays as annual fee 50,000 EUR.

ESMA proposes that in case an already recognised TC-CCP is determined, following the performance of the tiering process, to be a Tier 2 TC-CCP, that TC-CCP should pay in addition 300,000 EUR. This additional fee will be reduced to 150,000 EUR, in case the TC-CCP requests application of comparable compliance before it is recognised.

ESMA proposes that in case an already recognised TC-CCP is determined, following the performance of the tiering process, not to be a Tier 2 TC-CCP, that TC-CCP should not pay any additional fee to the 50,000 EUR that it has already paid.

## 6.4 Comparable compliance

58. Article 25a of EMIR as amended by EMIR 2.2 envisages the possibility for a Tier 2 TC-CCP to request that ESMA assesses its comparable compliance with the requirements under EMIR, i.e. the extent to which the CCP's compliance with Article 16, Title IV and Title V of EMIR is satisfied by the CCP's compliance with the comparable requirements applicable in the third country. The new Article 25a(3) of EMIR mandates the EC to adopt a delegated act to specify: (a) the minimum elements to be assessed for the purposes of paragraph 1 of Article 25a; (b) the modalities and conditions to carry out the assessment. In accordance with Article 82(3) of EMIR, the EC shall endeavour to consult ESMA before adopting such a delegated act.
59. Therefore, as explained in the CP, when a Tier 2 CCP submits a reasoned request that ESMA assesses comparable compliance with the relevant home rules that apply to that TC-CCP, ESMA will need to carry out a detailed assessment of the provisions for which comparable compliance is applicable. This detailed assessment will result in increased initial costs, which is the result of the additional activities to be performed vis-à-vis the Tier 2 TC-CCP. However, following the completion of the assessment, the resulting on-going supervisory and administrative effort towards that Tier 2 TC-CCP will be reduced, as it is expected that there will be a greater level of reliance on the compliance with EMIR through the compliance with comparable rules applying to that TC-CCP. This being said, it is worth mentioning that ESMA will still incur important costs, as the application of comparable compliance requires a much more complex compliance assessment, because the EMIR requirements would need to be complied with indirectly, it will also need to take into account the assessments made by the home regulator and it will require adaptations to consider the specificities of the third country regulatory and supervisory framework as well as the specificities of individual products. On balance, however, this will ultimately reduce the annual fees charged to the relevant Tier 2 TC-CCPs, because ESMA will be able to rely on assessments and supervisory activity conducted by the home authority.

60. ESMA also indicated in the CP that it does not expect that all entities would have the same level of comparable compliance. However, ESMA is also mindful that high granularity of the fees and respective discounts relating to the application of comparable compliance would increase the financial management costs unnecessarily, with limited tangible benefit for the entities and ESMA. Nevertheless, with regards to the discounts applicable in case comparable compliance is granted, two options were considered in the CP.
61. Therefore, given the ESMA budget procedure, this will result in (i) balancing the fees paid by the other Tier 2 TC-CCPs which do not have comparable compliance and (ii) lowering the total number of FTEs needed, thus lowering the total cost of TC-CCP activities.
62. For the avoidance of doubt, if the application of comparable compliance for a given Tier 2 TC-CCP is removed, then the discount will not be applicable. The payment and reimbursement of the one-off fee are detailed below.
63. Option A proposed by ESMA establishes a single additional fee of 250,000 EUR for the assessment of the applicability of comparable compliance and a 20% discount from the annual fees for the entities for which comparable compliance is applicable.
64. Option B alternatively establishes a single additional fee of 250,000 EUR for the assessment of the applicability of comparable compliance and two levels of discount (15% and 35% respectively), depending on whether the Tier 2 TC-CCP has a low or high degree of comparable compliance.
65. The reason for having a single one-off fee for requesting comparable compliance is that at the time of the request most likely it will not be known if the resulting comparable compliance will be high or low. None of the respondents challenged this proposal.
66. The benefits of Option A are that it (i) simplifies the determination of comparable compliance from a fee management perspective, (ii) eliminates any potential conflicts of interest with regards to the determination of high or low level of comparable compliance by the applicant Tier 2 TC-CCP or by ESMA and (iii) ensures increased upfront predictability of fees for applicant Tier 2 TC-CCPs. The drawback of this approach is that it applies the same discount to entities which might have very different levels of comparable compliance.
67. The benefits of the alternative Option B compared with Option A are that it more accurately represents the different level of applicability of comparable compliance and thus related costs. The drawbacks of Option B compared with Option A that were indicated in the consultation paper however are that it (i) makes more complex the determination of comparable compliance from a fee management perspective, (ii) might potentially create conflict of interest for the applicant Tier 2 TC-CCP or ESMA with regards to the determination of low or high comparable compliance and (iii) reduces upfront predictability of fees for applicant Tier 2 TC-CCPs.
68. However Only one respondent supported Option A. The rest were in favour of a more proportionate approach that takes into account the level of comparable compliance. Therefore, ESMA will include in its technical advice the proposal to establish two levels

of comparable compliance discounts. To mitigate the conflict of interest that was identified for that option, ESMA proposes in this advice to establish quantitative thresholds for the determination of low or high comparable compliance. The application of a low comparable compliance discount will take place when for a given Tier 2 TC-CCP there is comparable compliance for up to 50% of the EMIR provisions, as amended by EMIR 2.2. Otherwise, the high comparable compliance discount should apply.

ESMA proposes that the following framework for comparable compliance fees under EMIR 2.2.:

A. One-off fee of 250,000 EUR for each entity requesting comparable compliance in addition to the one-off initial recognition fee;

B. Two levels of discount compared with the amount due by entities without comparable compliance

- i. 15% discount for the annual fee for entities with low comparable compliance, that is, entities for which up to 50% of the EMIR provisions are fulfilled;
- ii. 35% discount for the annual fee for entities with high comparable compliance, that is, entities for which more than 50% of the EMIR provisions are fulfilled.

If the application of comparable compliance for a given Tier 2 TC-CCP is removed, then the discount will not be applicable.

## 6.5 First-year fee following initial recognition

69. As ESMA indicated in the CP, it is very unusual that a recognition decision would take place on the last day of a calendar year and it will enter into force on the first day of the subsequent calendar year. Normally, administrative decisions take place during the calendar year. This requires that the costs until the end of a given year are covered by fees which are not the recognition fees.
70. Under EMIR and SFTR, ESMA indicated that the supervisory activities in the first year after registration are linked to the registration process and included a formula for calculating the first-year fee as a percentage of the registration fee which is similar to the initial recognition fee in this CP.
71. ESMA therefore proposed that the percentage should be related to the period of time during which the TC-CCP is supervised in its first year of operations under the EMIR 2.2. framework. This period should, of course, be linked to the period required to recognise a TC-CCP. EMIR establishes 30 working days for assessment of completeness and 180 working days for granting recognition. ESMA understands that this is the most proportionate approach and the one ensuring greater alignment with other types of fees already charged by ESMA and thus proposed calculation according to the below

$$TC-CCP \text{ first-year fee} = \text{Min} (\text{Recognition fee}, \text{Recognition fee} * \text{Coefficient})$$

$$\text{Coefficient} = \frac{\text{Supervisory working days TC-CCPi}}{210 \text{ working days}}$$

72. The respondents generally agreed with this proposal and mentioned as its main benefits the use of the pro-rata base and the proportionality with the registration fees. As a result, ESMA will confirm it in the final advice.

ESMA proposes the following first-year recognition fees:

$$\text{TC-CCP first-year fee} = \text{Min} (\text{Recognition fee}, \text{Recognition fee} * \text{Coefficient})$$

$$\text{Coefficient} = \frac{\text{Supervisory working days TC-CCPi}}{210 \text{ working days}}$$

## 6.6 Annual fees

### 6.6.1 Introduction

73. As indicated in section 3, ESMA's budget is defined prior to the beginning of a given calendar year, and all fee revenues are considered as general revenue.
74. In the CP, ESMA already indicated that it is assigned with several recurrent tasks under EMIR 2.2. and establishing a separate fee for each activity will overcomplicate the fee schedule for the supervised entities, thus run contrary to the principles included in section 3. In addition, it could create a misperception of potential conflict of interest to perform those activities that require higher fees. Therefore, consistently with other annual fees already charged by ESMA, such as those to TRs and CRAs, ESMA is proposing to establish fees that are not linked to specific tasks, but rather cover all activities related to TC-CCPs.
75. Tasks related to Tier 1 TC-CCPs will be established in a way to perform the relevant assessment of compliance, and it will cover all the fixed costs – periodic review, requests for information, on-going monitoring and, investigations. The activities vis-à-vis Tier 2 TC-CCPs will cover much more tasks, including all those relevant for Tier 1 TC-CCPs. In that regard, the annual fee for Tier 1 TC-CCPs could be seen as a sort of a minimum fee already in place for TRs and CRAs under the ESMA fee regulations. ESMA understands that the predictability of the annual fees for TC-CCP to is relatively high, having regard to (i) the fact that the universe of entities that might be subject to EMIR 2.2. is known and to the (ii) budgeting approach indicated in section 3.
76. Two respondents supported the approach, while four of the rest focused their feedback mainly on the actual levels of fees, on the process for determining Tier 1 and Tier 2 TC-CCPs and not on the approach. The issue with conflict of interest and charging fees to TC entities is already covered in section 2.
77. Another more general topic that was mentioned was on the comparable compliance and how the assigned level of comparable compliance will influence the level of fees charged and the ESMA's costs. The technical aspects are included in section 6.4, but it is worth

clarifying that in case where some or all the entities have comparable compliance fee reduction, then ESMA will subsequently align its supervisory costs.

78. Under Article 25d(2) the fees charged to TC-CCPs shall be proportionate to their turnover. In the case of TC-CCPs, the proportionality of fees with the turnover cannot be assessed in isolation. It has necessarily to be considered in conjunction with the relevance of a given TC-CCP in the EU. The relevance of a TC-CCP for the EU is linked, among others, to the revenues that are obtained providing services in the EU or to EU clearing members. Moreover, ESMA proposes to establish separate annual supervisory fee for Tier 1 TC-CCPs and Tier 2 TC-CCPs. By establishing separate fees for Tier 1 TC-CCPs and Tier 2 TC-CCPs, which leverage on the relevance that a TC-CCP has in the Union, ESMA also understands that its advice complies with the requirement in Article 25 to apply fees that are proportionate to the turnover of the TC-CCPs.
79. The specific more technical aspects of this proposal are described in sections 6.6.2 and 6.6.3.

#### 6.6.2 Annual fees for Tier 1 TC CCPs

80. The fees for Tier 1 TC-CCPs cover the activities vis-à-vis Tier 1 TC-CCPs that will be performed by ESMA.
81. These include, as mentioned earlier, all the fixed costs – tiering review, requests for information, on-going monitoring and investigations.
82. Therefore, in the CP ESMA indicated that the fees for Tier 1 TC-CCPs could be considered as a minimum fee which is already in place for other supervised entities such as TRs and CRAs. Having regard to ESMA's cost estimates referred to in section 4 and given the tasks required under EMIR 2.2. ESMA proposed in the CP to establish this fee at the level of 50,000 EUR.
83. The feedback was split, with some respondents considering that 50,000 EUR is an appropriate amount, while others opposing it. One said that “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”. As explained in this and in previous sections, ESMA performs tasks under EMIR 2.2. and there is a legal mandate to cover the supervisory costs with fees, hence those cannot be removed. Furthermore, to the extent possible, cross-subsidies between activities should be avoided. Thus, for reasons of access to particular markets, ESMA should not charge its costs to other CCPs or to ESMA's general budget. Fees need to be on a cost recovery basis and the cost associated with Tier 1 CCPs do not depend on the business opportunities of EU clearing members on those markets. Moreover, the level of fees and its determination are clearly indicated in section 4.
84. Another one indicated that the level of proposed fees is not aligned with the ones charged by other TC authorities to the recognised TC-CCPs. This aspect is also covered in detail in section 2.

85. ESMA therefore reiterates its proposed level of fees to Tier 1 TC-CCPs.

ESMA proposes that each Tier 1 TC-CCPs pays an annual fee of 50,000 EUR.

### 6.6.3 Annual fees for Tier 2 TC-CCPs

86. In the CP, ESMA explained that the annual budget definition process under EMIR 2.2. will follow the same steps as the budget for any other revenue from supervised entities received by ESMA:
- a. Determination of budget, i.e. the number of FTEs working directly or indirectly on Tier 2 TC-CCPs.
  - b. Attribution of the relevant fixed and minimum fee amounts to the relevant supervised entities
  - c. Allocation of the resulting portion of fees to the relevant group of supervised entities
87. Further, ESMA indicated that differently from other industries supervised by ESMA, CCPs have already an extensive track record and the business models, while evolving, are based on similar pillars. The potential disruption of new suppliers of clearing services is neither considered an issue, as any potentially successful commercial offering will be assessed in the tiering processes required under EMIR 2.2.
88. Moreover, once a TC-CCP is deemed as systemically important, the supervisory and administrative effort will be very similar, although not identical, across all Tier 2 TC-CCPs. ESMA therefore proposed a flat annual fee for all Tier 2 TC-CCPs. The rationale for this was the following:
- a. It increases the predictability of fees,
  - b. it reduces the complexity in fees calculation in terms of business year, exchange rates, attributable portion of revenues, etc.
  - c. it streamlines the fee management
  - d. it accounts for the proportionality between Tier 1 and Tier 2 TC CCPs
  - e. it leverages on the tiering process
89. Most of the respondents supported the ESMA's approach to have a flat annual fee for Tier 2 TC-CCPs, as the profitability of a CCP is not itself directly linked to the supervisory costs. Moreover, it was mentioned that such an approach could disincentivise TC-CCPs from improving their product range and risk management practices if they consider that those enhancements come at an additional ESMA supervisory cost.
90. One respondent also indicated that in the case of comparable compliance, the fees for Tier 2 TC-CCPs should be as the ones for Tier 1. This aspect is discussed in section 6.4.
91. Two respondents linked the proportionality with the fees charged by the home authority and the supervisory effort by ESMA and also requested also a linkage with the fees charged by other host authorities. One of them also considered that in case the fees took

into account the revenues, it should be all the revenues generated by the CCPs, not only the ones linked to the EU. ESMA however understands that this will deviate from the objectives of EMIR 2.2. and will introduce an element of incomparability between the TC-CCPs as they have global business models under which some business lines could have little or no impact over the EU.

92. As indicated previously in section 2, ESMA considers impractical to link the fees to the ones charged by home supervisor or to the ones charged by other host supervisors given that neither the regulatory and supervisory framework of those jurisdictions, nor the costing model of the supervisory agencies, or the relevant marketplace are the same as the EU. Indeed, the fees will be proportionate to the supervisory effort towards the Tier 2 TC-CCPs.
93. Given the support to the ESMA's proposals and the unavailability of alternatives suggested by respondents, ESMA retains the approach.

ESMA proposes that each Tier 2 TC-CCPs pays an equal annual fee. The annual fee is determined by allocating to each Tier 2 TC-CCP an equal share of the ESMA costs<sup>10</sup>, decreased by the following fees due by TC-CCPs for the same year:

- a. One-off recognition fees, including the additional comparable compliance fee
- b. First-year fees
- c. Annual fee for Tier 1 TC-CCPs

Notwithstanding the previous paragraph, when comparable compliance is applicable, the Tier 2 TC-CCP will receive the applicable discount.

## 6.7 Fees for withdrawal of TC-CCP recognition

94. Article 25m of EMIR 2.2. includes a possibility for ESMA to withdraw the recognition of a TC-CCP. This provision resembles the one for trade repositories under EMIR while adding the specific cases for TC-CCPs such as impossibility for ESMA to exercise effectively its responsibilities and the suspension or withdrawal of the equivalence decision. In addition, there is a possibility to withdraw recognition only for a particular service, activity or class of financial instrument.
95. ESMA indicated in the CP that while under the current ESMA fee regulations, ESMA has not envisaged any specific fee for withdrawal of registration or recognition of TRs, the experience in implementing EMIR showed that there was a need to establish such fee, mainly to more directly account for the supervisory costs vis-à-vis a given entity. Otherwise the extra supervisory effort would be covered by the annual fees paid by all the TC-CCPs. Given that the partial withdrawal of recognition would not mean that the

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<sup>10</sup> ESMA costs for the period 2021-2023 could include part of the EC advancement which was not covered by fees paid by TC-CCPs in 2019 and 2020.

TC-CCP will cease to service the EU, ESMA indicated that there was no need to set up a specific fee for withdrawal of recognition for a particular service, activity or class of financial instrument, as the TC-CCP would continue to be supervised. However, ESMA concluded that when the recognition of the TC-CCP is withdrawn, then there was a need to establish such a fee.

96. ESMA mentioned also that the work carried out during a full withdrawal phase is unknown, however it is expected that it will be less than the one during recognition. For the purposes of this consultation ESMA believes that the supervisory and administrative effort would be proportionate to half the work undertaken to recognise the TC-CCP. Withdrawal of recognition requires a thorough assessment and supervision of the required wind-down of services. ESMA also proposed to not include the extra charge for comparable compliance assessment, as when the withdrawal of recognition takes place, there is no need to consider the conditions of comparable compliance.
97. Only one respondent supported the inclusion of withdrawal fee, however that entity indicated that the fee should be the same for Tier1 and Tier 2 TC-CCPs, as there is no great difference in the tasks to be performed. The rest of the respondents indicated that such a fee did not exist at other authorities and that it would create a barrier to exit, hence it should not be considered.
98. ESMA takes note of the feedback and will remove this fee.
99. For the avoidance of doubt, in case Article 25(2c) is applied to a Tier 2 TC-CCP, it will still have to pay the annual supervisory fee for a Tier 2 TC-CCP until it continues to be recognised.

If a Tier 2 TC-CCP is assessed under Article 25(2c) as not being able to provide its services in the EU unless it is authorised under Article 14, it will still have to pay the annual supervisory fee for a Tier 2 TC-CCP until its recognition is withdrawn.

## **6.8 Payment and reimbursement conditions under EMIR 2.2.**

### **6.8.1 Fees for initial recognition and for application of comparable compliance**

100. Similar to the established practice under other fee regulations, ESMA indicated in the CP that the fees for tiering and initial recognition are due at the time of application for recognition and should be paid by TC-CCPs upon the initiation of the recognition process.
101. As mentioned in section 6.1, once a TC-CCP is determined to be a Tier 2 CCP, ESMA will need to receive additional information from the Tier 2 TC-CCPs in relation to their specific conditions for recognition.
102. In this regard, ESMA proposed that both Tier 1 and Tier 2 TC-CCPs pay the respective initial recognition fee once the determination of whether they are Tier 1 or Tier 2 has taken place, although the fee is due at the time of application. ESMA pointed out that

this will result in only one payment made by TC-CCPs and it will facilitate ESMA's fee management.

103. Moreover, ESMA acknowledged the fact that in case an entity is determined to be Tier 2 TC-CCP, it may decide to request the application of comparable compliance. However, there is no certainty, neither an obligation, as to when the Tier 2 TC-CCP will do so. Therefore, it should pay the initial recognition fee as soon as it is determined to be a Tier 2 TC-CCP and the additional fee for the comparable compliance assessment, only when it requests this application of comparable compliance.
104. The feedback on the payment conditions for the initial recognition fee was somehow split, with some of the respondents linking the payment of recognition fee with the successful recognition by ESMA. While worthwhile exploring, this approach has two main drawbacks (i) does not account timely the effort to assess an application for recognition and (ii) creates a conflict of interest for ESMA to consider all applicants as compliant and recognise them. Some respondents also stated that a model of pay as you go could be established as it will "limit losses for the venture if the initial assessment reveals that the business case would be unviable due to the costs involved." ESMA believes that such an approach will increase the predictability of fees, while it will still impact negatively the fee management.
105. The feedback on the payment conditions for comparable compliance was more in the direction of payment after a successful determination, however neither the conflict of interest to determine the entity as subject to comparable compliance, nor the supervisory effort from ESMA to assess it were considered by the respondents. Moreover, one of them, while requesting simplified fee schedule in other responses indicated that there might be smaller fees for reaching given milestones in the comparable compliance determination or others linked to submission of specific documents. ESMA considers that both proposals are not appropriate, as they will make the process extremely burdensome and will impact negatively the fee management by ESMA.
106. In this regard and taking into account the proposal to simplify the payment of fees and increase predictability, ESMA amends its proposals as follows.

Under EMIR 2.2, ESMA proposes that each TC-CCP pays the one-off recognition fee upon filing the application for recognition.

Once the determination has taken place, the Tier 2 TC-CCPs will make the additional payment for assessment of compliance with EMIR.

In case a Tier 2 TC-CCP decides to request application of comparable compliance, ESMA proposes that this fee becomes payable at the time of the submission of the request.

## 6.8.2 No reimbursement of fees in case of withdrawal of application by a TC-CCP before ESMA's recognition

107. In the CP ESMA proposed to not reimburse fees to a TC-CCP which decides to withdraw its application before recognition is granted by ESMA. This is because the handling of its application and the preparatory work related to the tiering are costs already incurred already by ESMA. The same approach is taken with regards to fees for registration and extension of registration under EMIR and SFTR as well as to the application part of the recognition fee under SFTR. The main reasons supporting this proposal are the following ones:
- a. Limiting the spurious applications from companies aiming at providing clearing services without fulfilling a minimum set of requirements;
  - b. Reducing ESMA's budget burden and other TC-CCP's costs to sustain the costs of analysing all the application dossiers submitted and any follow-up action required until the withdrawal; and
  - c. Allowing ESMA to concentrate the limited resources available on the applications that carry a true intention of becoming a TC-CCP and to discourage the submission of spurious applications.
108. The feedback was also split, but the respondents that opposed the reimbursement adduced reasons such as non-transparent process or the costs incurred by the applicant TC-CCP. In this regard ESMA reiterates that the application process is very well-defined process, subject to the applicable administrative steps. In this respect and having in mind the supervisory costs incurred by ESMA in assessing an application for recognition, it will be unreasonable to support those costs with the fees paid by other TC-CCPs. The costs incurred by the applicant will be such in any case, hence ESMA understands that this is unrelated to the reimbursement in case of withdrawal.
109. ESMA therefore confirms its initial proposals.

ESMA proposes to not reimburse fees to a TC-CCP that decides to withdraw its application for recognition, including before the performance of tiering.

## 6.8.3 Annual fees

110. To fully support its activities vis-à-vis TC-CCPs, ESMA indicated in the CP that it will need to receive the supervisory fees ahead of the start of the calendar year and no later than 31 December. This approach is aligned with the ESMA's budgeting approach outlined in section 3.
111. This means that any periodic assessment which might result in a change of tier of the TCCPs should be completed by the end of the Q3 of a given year in order to produce and communicate the relevant fees for TC-CCPs.

112. Given the frequency of performance of ESMA's activities, they will produce administrative effects and potential changes in fees only from one calendar year to another.
113. There was a general support for a single payment of fees, which are not amendable in the course of the year. One respondent mentioned that the time period could be extended until the end of the first quarter. Another one requested a greater predictability of the annual fees and earlier communication to entities. ESMA agrees with this and will aim at communicating the fees payable at the earliest opportunity.

ESMA proposes that TC-CCPs pay their relevant annual fees by 31 December of the year preceding the one for which they are due. The fees should be calculated on the basis of the latest available information for annual fees.

#### 6.8.4 Withdrawal of recognition

114. Following the withdrawal of recognition of a TC-CCP, this entity will no longer be subject to ESMA's supervision. Therefore, in the CP ESMA proposed that the fee for withdrawal of recognition is paid by the TC-CCP at the time at which the process included under Article 25p is initiated. In case the withdrawal is requested by the TC-CCP, then the fee should be paid by the TC-CCP at the point in time when it requests the withdrawal of recognition. ESMA proposed that if the recognition is finally not withdrawn, no reimbursement will take place.
115. The feedback was aligned with the feedback to the existence of withdrawal fee. Therefore, in line with the ESMA proposal to remove the withdrawal of recognition fee, ESMA will remove from the advice the payment and reimbursement conditions for such fee.

#### 6.8.5 2019 and 2020 TC-CCP fees

116. While it is expected that EMIR 2.2. enters into force in Q4 2019, the relevant delegated act on fees of the EC could be adopted, pursuant to Article 82 EMIR, only at the beginning of 2020. The payment conditions for this are covered in sections 6.2 and 6.3 where these instances are discussed.

## 7 Annex

### 7.1 Annex I

#### Commission mandate to provide technical advice

ESMA received a provisional mandate on 3 May 2019 to provide technical advice for the development of the corresponding Delegated Act, on the basis of which ESMA ran a consultation, and on 30 October 2019 the mandate was confirmed.

PROVISIONAL REQUEST TO THE EUROPEAN SECURITIES AND MARKETS  
AUTHORITY (ESMA) FOR TECHNICAL ADVICE ON A POSSIBLE DELEGATED ACT  
CONCERNING THE SUPERVISORY FEES TO BE CHARGED TO THIRD-COUNTRY  
CENTRAL COUNTERPARTIES (CCPs)

With this provisional mandate, the Commission seeks ESMA's technical advice on a possible delegated act concerning the European Market Infrastructure Regulation (EMIR<sup>11</sup>) as amended by the 2019 CCP Supervision Regulation<sup>12</sup> (the "**Regulation as amended**"). This delegated act should be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

The provisional nature of the present mandate stems from the fact that the Regulation as amended has not yet entered into force. However, the Council (at the meeting of COREPER on 20 March 2019) and the European Parliament (in a plenary vote on 18 April 2019) have approved the political agreement on the text of the 2019 CCP Supervision Regulation. Currently, the 2019 CCP Supervision Regulation is subject to legal revision and translation prior to its publication in the EU Official Journal.

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

The mandate follows the EMIR Regulation (Article 82), the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**"),<sup>13</sup> and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").<sup>14</sup>

According to Article 25(bb) of the Regulation as amended and with regard to the supervisory fees to be charged to CCPs established in a third country, the Commission shall adopt a delegated act to specify further the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid.

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<sup>11</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.7.2012, p.1.

<sup>12</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0438+0+DOC+PDF+V0//EN>

<sup>13</sup> Communication of 9.12.2009. COM (2009) 673 final.

<sup>14</sup> OJ L 304, 20.11.2010, p. 47.

The European Parliament and the Council shall be duly informed about this mandate.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice within the European Securities Committee,<sup>15</sup> the Commission will continue, as appropriate, to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with experts appointed by the Member States within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The powers of the Commission to adopt delegated acts are subject to Article 82 of the EMIR Regulation. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

## **1. Context**

### **1.1 Scope**

On 13 June 2017, the Commission published its proposal to amend EMIR as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs. On 13 March 2019 the European Parliament and the Council reached a political agreement on a compromise text, which was formally endorsed by the two institutions respectively on 18 April 2019 and 20 March 2019. Publication in the Official Journal is expected by Q3 2019. The text will enter into force on the twentieth day following its publication.

The Regulation as amended will strengthen the framework for the supervision of Union and third-country CCPs that provide clearing services to EU clearing members or trading venues. This is to address the increasing concentration of risk in these infrastructures and the significant proportion of financial instruments denominated in Union currencies that are cleared outside the Union, including as a result of the expected withdrawal of the UK from the Union. The objective of the Regulation as amended is to reinforce the overall stability of the Union's financial system.

The Regulation as amended will strengthen ESMA's direct recognition and supervisory powers over third-country CCPs. Consequently, in accordance with Article 25d of the Regulation as amended, ESMA will charge fees to third-country CCPs and those fees shall cover all costs incurred by ESMA for the recognition and the performance of its tasks in relation to third-country CCPs. ESMA will charge fees based on a Regulation on fees to be adopted by the Commission in the form of a delegated act.

This provisional mandate focuses on the technical aspects of the Regulation on fees, including specifying further the type of fees, the matters for which fees are due, the amount of the fees

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<sup>15</sup> Commission's Decision of 6.6.2001 establishing the European Securities Committee, OJ L 191, 17.7.2001, p.45.

and the manner in which they are to be paid by (i) a third-country CCP that applies for recognition; (ii) a recognised third-country CCP not classified as systemically important or likely to become systemically important for the financial stability of the Union or one of its Member States ('Tier 1 CCP'); and (iii) a recognised third-country CCP classified as systemically important or likely to become systemically important for the financial stability of the Union or one of its Member States ('Tier 2 CCP'). In providing its advice ESMA should profit from the experience of relevant national authorities in setting supervisory fees for financial institutions.

## 1.2 Principles that ESMA should take into account

On the working approach, ESMA is invited to take account of the following principles:

- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of the Regulation as amended. It should be simple and avoid suggesting excessive financial, administrative or procedural burdens for third-country CCPs.
- The technical advice should take account of the rule-of-law principle, which requires appropriate rights of defense for persons that are subject to ESMA's supervision. At the same time, it should ensure a high level of investor protection, which is a guiding principle of EU financial regulation and requires a strong supervisor with the power to carry out supervision and ensuring compliance with the EMIR Regulation in an effective and efficient way.
- While preparing its advice, ESMA should seek coherence within the regulatory framework of the Union.
- In accordance with the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**")<sup>16</sup>, ESMA should not feel confined in its reflection to elements that it considers should be addressed by the delegated acts but, if it finds it appropriate, it may indicate guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness.
- ESMA will determine its own working methods depending on the content of the provisions being dealt with. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different standards of work being carried out by the various expert groups.
- In accordance with the ESMA Regulation, ESMA should, where relevant, involve the European Banking Authority and the European Insurance and Occupational Pensions

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<sup>16</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ L 331, 15.12.2010, p. 84.

Authority in order to ensure cross-sectoral consistency. It should also, where relevant, cooperate with the European Systemic Risk Board on any issues related to systemic risk.

- In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants in an open and transparent manner, and take into account the resulting opinions in its advice. ESMA should provide a detailed feedback statement on the consultation, specifying when consultations took place, how many responses were received and from whom, as well as the main arguments for and against the issues raised. This feedback statement should be annexed to its technical advice. The technical advice should justify ESMA's choices vis-à-vis the main arguments raised during the consultation.
- ESMA is invited to justify its advice by providing a quantitative and qualitative cost-benefit analysis of all the options considered and proposed. ESMA should provide the Commission with a description of the problem, the objectives of the technical advice, possible options for consideration and a comparison of the main arguments for and against the considered options. The cost-benefit analysis should justify ESMA's choices vis-à-vis the main considered options.
- ESMA's technical advice should not take the form of a legal text. However, ESMA should provide the Commission with a clear and structured ("articulated") text, accompanied by sufficient and detailed explanations. Furthermore, the technical advice should be presented in an easily understandable language respecting current terminology in the Union.
- ESMA should provide comprehensive technical analysis on the subject matters described in section 3 below, where these are covered by the delegated powers included in:
  - the relevant provision of the Regulation as amended;
  - the corresponding recitals, or;
  - the relevant Commission's request included in this mandate.
- ESMA should address to the Commission any question to clarify the text of the Regulation as amended that ESMA considers of relevance to the preparation of its technical advice.

## **2 Procedure**

The Commission is requesting ESMA's technical advice in view of the preparation of a delegated act to be adopted pursuant to the Regulation as amended and in particular regarding the questions referred to in section 3 of this mandate.

The mandate takes into account the EMIR Regulation (Article 82), the ESMA Regulation, the 290 Communication and the Framework Agreement.

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate will not prejudice the Commission's final decision.

In accordance with established practice, the Commission may continue to consult experts appointed by the Member States in the preparation of delegated acts relating to the Regulation as amended.

The Commission has duly informed the European Parliament and the Council about this mandate. As soon as the Commission adopts the delegated act, it will notify it simultaneously to the European Parliament and the Council.

### **3 ESMA is invited to provide technical advice on the following issues**

The Regulation as amended requires the Commission to adopt a delegated act on fees specifying further the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid by (i) a third-country CCP that applies for recognition; (ii) a recognised third-country CCP not classified as systemically important or likely to become systemically important for the financial stability of the Union or one of its Member States ('Tier 1 CCP'); and (iii) a recognised third-country CCP classified as systemically important or likely to become systemically important for the financial stability of the Union or one of its Member States ('Tier 2 CCP'). The Regulation further specifies that the fees collected from third-country CCPs shall cover all costs incurred by ESMA for the recognition and the performance of its tasks in relation to third-country CCPs. The fees charged to CCPs established in a third country shall be proportionate to the turnover of the CCPs concerned.

ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act on fees for third-country CCPs, and more specifically on the following aspects:

- ESMA is invited to reflect on the type of fees that could be levied. The Regulation provides for (i) fees associated with applications for recognition and (ii) annual fees associated with ESMA's tasks in relation to recognised third-country CCPs. Fees associated with applications for recognition could be levied on a one-off basis, while annual fees would cover all supervisory activities for a year.
- Regarding fees associated with applications for recognition, ESMA should draw up a list of fees related to the recognition process with the corresponding amounts in order to reflect the two-tier classification system (Tier 1 and Tier 2 CCPs). ESMA is also invited to advise on whether the fees' structure should take into account the non-recognition of a third-country CCP.
- Regarding annual fees associated with ESMA's tasks in relation to recognised third-country CCPs, ESMA should indicate how the annual fees should be calculated, i.e. how its expenditure necessary for the performance of its tasks in relation to third-country CCPs should be distributed to the individual supervised CCPs, taking into account their classification as Tier 1 or Tier 2 CCPs. ESMA is invited to advise on whether fees should be yearly adjustable or fixed.
- ESMA is invited to reflect on the matters for which the fees are due. Beyond fees associated with applications for recognition, ESMA could specify what type of supervisory activities would be associated with the performance of ESMA's tasks under the Regulation as amended

for Tier 1 and Tier 2 CCPs (e.g. ongoing supervisory activities, review of recognition decisions, assessment of comparable compliance, on-site inspections, stress tests).

- According to Article 25d of the Regulation as amended, the amount of fee charged to a third-country CCP shall cover all costs incurred by ESMA for recognition and the performance of its tasks in accordance with the Regulation as amended. ESMA is invited to detail its assessment of the costs it will incur for the recognition and supervision activities of third-country CCPs, and provide information on its estimates and methods of calculations. ESMA should indicate how the costs in the recognition and supervision of third-country CCPs may differ depending on their classification as Tier 1 or Tier 2 CCPs. ESMA should also advise on how the surpluses/deficits in ESMA supervision budget for third-country CCPs should be managed.

- According to Article 25d of the Regulation as amended, the amount of fee charged to a third-country CCP shall be proportionate to the turnover of the CCP concerned. ESMA is invited to provide its technical advice on appropriate method for considering the turnover of the CCP in fee calculations.

- According to Article 25d of the Regulation as amended, ESMA's costs incurred by the recognition and the performance of its tasks in relation to third-country CCPs shall be covered by fees levied from third-country CCPs. This will apply when the delegated act on fees for CCPs is adopted and enters into force, from 2021 at the latest as laid down in the legislative financial statement accompanying the 2019 CCP Supervision Regulation. Prior to this, an advance of the EU budget is required to cover ESMA's costs incurred to ensure that ESMA has the necessary resources available to perform the tasks required under the Regulation as amended in relation to third-country CCPs. The costs for third-country CCP recognition and supervision should therefore be claimed back from third-country CCPs on the basis of the Regulation on fees. ESMA should suggest modalities for the recovery of these costs from third-country CCPs.

- ESMA should suggest the timing and appropriate modalities of the payment of the fees by (i) applicant third-country CCPs, (ii) recognised CCPs classified as Tier 1 CCPs, and (iii) recognised CCPs classified as Tier 2 CCPs. ESMA is invited to advise on appropriate schedules for collection of fees (one single payment vs several payments). It has to be ensured that ESMA always disposes of the necessary resources to finance its activities related to third-country CCPs. This could for instance be achieved by requiring the supervised third-country CCPs to pay the expected fees upfront, drawing up an account at the end of the year. ESMA may also reflect on possible penalties in case of late payment, while ensuring that such penalties are proportionate to the amount due.

#### **4. Indicative timetable**

This mandate takes into consideration that ESMA requires sufficient time to prepare its technical advice and that the Commission needs to adopt the delegated acts according to Article

290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 82 of the EMIR Regulation that allows the European Parliament and the Council to object to a delegated act within a period of 3 months, extendible by 3 further months. The delegated act will only enter into force if neither European Parliament nor the Council has objected on expiry of that period or if both institutions have informed the Commission of their intention not to raise objections.

As laid down in the legislative financial statement accompanying the 2019 CCP Supervision Regulation, the delegated act on fees will need to enter into force by 2021 at the latest in order for ESMA to be able charge fees to third-country CCPs and for the advance to the EU budget to be repaid by 2023. Therefore it is of outmost importance to start working on this issue as soon as possible.

The deadline set to ESMA to deliver the technical advice is Q3 2019.