



Responses to European Commission (Commission) Proposed Delegated Acts on Comparable Compliance Article 25a of EMIR 2.2

1. Introduction

FIA and ISDA (together the “**Associations**”) welcome the opportunity to provide feedback on the Commission Draft Delegated Act on **comparable compliance** under Article 25a of EMIR 2.2 and commend the Commission for arriving at a balanced approach regarding the required assessments of third-country clearing houses (**TC-CCPs**) requests for comparable compliance and the **modalities and conditions** of that assessment.

As set out in our feedback on the European Commission EMIR Review Proposal Part 2 (authorisation and recognition of CCPs),¹ and ESMA consultation paper on draft technical advice on comparable compliance under Art. 25a² of EMIR (“**ESMA Technical Advice**”), the Associations support the overall goal of ensuring that offering clearing services to European Union (**EU**) market participants is appropriately regulated and supervised.

Firstly, we congratulate and applaud the Commission for formulating a pragmatic and clear approach in the proposed DAs. We recognise and thank the Commission for taking into account many of our comments to ESMA’s Technical Advice.

2. Feedback to the consultation on the Draft Delegated Acts (DA) on criteria for comparable compliance under Article 25a of EMIR 2.2

In summary, we have the following comments on the proposed comparable compliance assessments as currently drafted.

We appreciate the Commission efforts to require that the assessment of comparable compliance focuses on whether compliance with a third-country framework may satisfy compliance with EMIR and that equivalence determinations should be taken into account. The Commission rightly points out that this will lead to a Tier 2 TC-CCP not to face unnecessary burden and that comparable compliance now means that a Tier 2 classified TC-CCP will be

¹ https://fia.org/sites/default/files/2017-09-07_EC_third_country_CCP_proposals.pdf;
<https://www.isda.org/a/EVKDE/ISDA-Response-EMIR-2-Final.pdf>

² <https://www.fia.org/articles/fia-responds-esmas-emir-22-level-2-tiering-and-comparable-compliance>;
<https://www.isda.org/a/EVKDE/ISDA-Response-EMIR-2-Final.pdf>

able to access EU markets through compliance with their domestic rules to the benefit of EU firms that are serviced by those CCPs.

We appreciate that the assessment process will be faster as ESMA should perform the assessment within 90 working days (vs 180 proposed by ESMA) from the receipt of a complete reasoned request from the TC-CCP.

However, as outlined below, we believe further clarity is warranted in certain areas to ensure the third-country framework and equivalence decision is effectively recognised.

3. Remaining requests for clarifications/recommendations

We would like to highlight the following remaining issues and recommend further clarifications in the following areas:

(I) Article 1 - Procedure for submitting a request for comparable compliance

Article 1 sets out the procedure for a Tier 2- TC-CCP to request comparable compliance and we are comfortable with the approach taken by the Commission. We recommend providing further clarity and align the timeline for a Tier-2 TC-CCP to prepare its request to ESMA for comparable compliance with ESMA's timeframe for assessment of comparable compliance and allow TC-CCPs to submit its request within a 90-working day timeframe. The preparation of a comparable compliance request is a time-consuming exercise and additional time will ensure that TC-CCPs will have sufficient time to prepare such requests with the appropriate care.

(II) Articles 3 and 4 Comparable compliance with Title IV and V of EMIR

1. Overall, we recommend the Commission to provide more clarity regarding Articles 3 and 4, as well as related Annexes I and II, as it remains unclear how a holistic, outcomes-based approach to the comparable compliance approach would be taken in practice. In particular, the language under Articles 3 and 4 that states that comparable compliance is found where "the Tier 2 CCP ***complies*** with all relevant elements set out in" Annexes I and II. The elements outlined under the related Annexes are fairly granular and would effectively require a Tier 2 CCP to comply with requirements other than those defined under its local regulatory framework and given the structure of the Annexes, it could still be interpreted in a way that compliance should be assessed on a requirement-by-requirement basis, which appears to be contrary to the intention of what the DA wants to achieve. The Commission seems clear in its explanatory notes to the proposed DAs that a Tier 2 CCP will not have to apply an EMIR requirement as a minimum floor where the corresponding requirement in the third country is not identical to allow comparable compliance with respect to that requirement. Consequently, in addition to clearly recognizing the equivalence decision, we recommend to revise Articles 3 and 4 to state

that: *“the Tier 2 CCP complies with local laws and regulations that are comparable to all relevant elements set out in Annex [I/II] on a holistic, outcomes-basis.”*

2. Annex I

More specifically, we recommend the Commission to make additional changes in the following areas:

(a) Recordkeeping (Chapter 1: Organisational requirements)

A TC- CCP would be expected to maintain, for a period of at least 10 years, all the records on the services and activity provided to enable its competent authority to monitor its compliance with the relevant third-country framework. The 10-year retention period should also apply to the maintenance of records following the termination of a contract, all information on all contracts it has processed to enable the identification of the original terms of a transaction before clearing by that CCP.

We note that that not all third-country jurisdiction have such a 10-year recordkeeping requirement and it appears overly prescriptive and goes beyond international standards. By way of example, the US have in place a recordkeeping requirement of 5 years; We would respectfully ask the Commission to reduce the record keeping requirement to a 5-year retention period for TC-CCPs.

(b) Complaints handling (Chapter 2: Conduct of Business Rules)

The Annex sets the expectation for a TC- CCP to have transparent and fair rules for the prompt handling of complaints or the resolution of disputes.

We note that CCPs in other jurisdictions have dispute resolutions processes but no complaints processes and suggest that such process achieves the requirements sufficiently.

(III) Article 5 - Exemptions and incompatible requirements

We are supportive of the specific conditions for the assessment as set out in Article 5 and Article 5(1) provides that ESMA shall not refuse comparable compliance on grounds that the third-country framework makes it impossible for the TC-CCP to comply with the relevant EMIR requirements. Article 5(2) sets out the specific requirements which the TC-CCP must satisfy. We recommend adding to the requirements in Article 5(2)(a) a reference to "acting in a manner or establishing rules or processes that would be unenforceable under third-country laws". This would provide legal clarity and certainty for clearing participants and TC-CCPs alike and will assist with any potential conflicts of laws issues.

(IV) Other

We do believe that both tiering and comparable compliance assessments could result in significant overlap in information required to be submitted by TC-CCPs and in order to further reduce burden and compliance costs we would recommend that where relevant information is submitted for the recognition process it should not be required to be resubmitted under Comparable Compliance assessment should a TC-CCP chooses to apply for.

FIA and ISDA members look forward to engaging throughout this final evaluation process and remain at the Commission's disposal to discuss any elements of the response or to provide additional input as need be.

About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry.

FIA's mission is to:

- support open, transparent and competitive markets,
- protect and enhance the integrity of the financial system, and
- promote high standards of professional conduct.

As the leading global trade association for the futures, options and centrally cleared derivatives markets, FIA represents all sectors of the industry, including clearing firms, exchanges, clearing houses, trading firms and commodities specialists from more than 48 countries, as well as technology vendors, lawyers and other professionals serving the industry.

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 74 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on [Twitter](#), [LinkedIn](#), [Facebook](#) and [YouTube](#).