



Responses to European Commission (Commission) Proposed Delegated Acts on criteria for tiering under Article 25(2a) 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 criteria for tiering under Article 25(2a) of EMIR 2.2 (“**DA**”) and commend the Commission for arriving at a balanced approach when it comes to classifying a third-country clearing house (“**TC-CCPs**”) as systemically important, or likely to become systemically important.

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 the criteria for tiering under Art. 25(2a)² (“**ESMA Technical Advice**”), the Associations support the overall goal of ensuring that offering clearing services to European Union (**EU**) market participants are appropriately regulated and supervised.

Firstly, we congratulate and applaud the Commission for formulating a pragmatic and clear approach in the proposed DAs. The Commission has taken many of our comments to ESMA’s Technical Advice into account. The DA provides for:

- A greater level of predictability for TC-CCPs;
- Quantitative thresholds for an initial determination of whether a CCP falls under the Tier-1 category or might require further analysis and may be determined to be a Tier-2 CCP;
- A streamlined two-step process that will reduce the effort to provide and analyse data; and
- A clearer focus on an EU nexus of criteria;

Consequently, our comments mostly represent requests for clarification.

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>

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

In summary, we have the following comments on the proposed tiering criteria as currently drafted.

Firstly, we appreciate the Commission's efforts to further streamline and simplify ESMA's suggested approach and to improve the proportionality of the DA Tiering. The introduction of objective indicators and quantitative thresholds provides greater predictability for TC-CCPs. The Associations are pleased to see that a clear nexus to the EU has been introduced into the majority of the tiering criteria, by taking into account the activity of EU clearing members (and their affiliates) and clients in the TC-CCP or the activity such CCP conducts in instruments denominated in Union currencies.

The introduction of a two-step approach to the tiering assessment process and to require ESMA to rely as much as possible either on publicly available data or on data already in its possession enhances ESMA's efficiency and effectively reduces the administrative burden and costs for TC-CCPs.

3. Remaining requests for clarifications/recommendations

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

- We recommend the Commission to exclude pound sterling procedurally from ESMA's overall assessments in accordance with the final Delegated Acts and especially concerning the threshold calculations at Article 6 of the DA Tiering. Excluding pound sterling would lead to a more appropriate assessment when determining a TC-CCP's systemic importance for the financial stability of the EU or one or more of its Member States.

By way of further explanation, there appears to be a divergence of views when it comes to the position of pound sterling being treated as a Union currency during the transitional period. When examining Part 4 (Transition) of the EU/ UK Withdrawal Agreement, Article 127 (6) of the Withdrawal Agreement provides that "Unless otherwise provided in this Agreement, during the transition period, any reference to Member States in the Union law applicable pursuant to paragraph 1, including as implemented and applied by Member States, shall be understood as including the United Kingdom."

EMIR 2.2 and the draft Delegated Acts refer to "Union currencies". They do not expressly refer to "Member States" but presumably "Union currencies" should be interpreted to mean "the currencies of one or more Member States". In this case the United Kingdom would be covered and hence references to "Union currencies" in EMIR 2.2 and the

Delegated Acts would be interpreted, until the end of the transition period (or if the transition period is extended, until the end of the latter), to include pound sterling.

After the end of the transition period any references to “Union currencies” would exclude pound sterling. This would also be consistent with the objective of Part 4 of the Withdrawal Agreement as implementing a standstill during the transition period.

However, references to Union currencies in EMIR 2.2 typically arise in the context of references to “central banks of issue of Union currencies” and the Withdrawal Agreement indicates that the Bank of England is not to be treated as a national central bank for various purposes. Article 128(4) of the Withdrawal Agreement states that: “For the purposes of participation in the institutional arrangements laid down in Articles 282 and 283 TFEU and in Protocol (No 4) on the Statute of the European system of central banks and of the European Central Bank, with the exception of Article 21(2) of that Protocol, during the transition period, **the Bank of England shall not be considered to be a national central bank of a Member State.**”

(I) Articles 1 and 3: The nature, size and complexity of the CCP’s business - information on direct and indirect clients:

- In most cases, information on clients and indirect clients of clearing members is not held by the CCP. Furthermore, information on indirect clients may not even be held by the clearing members themselves. This would be particularly true for exchange-traded derivatives (ETD) where indirect clearing is a well-established clearing model. As such we suggest clarifying the language in Article 1.3(c) in line with Article 3.1(a) to make clear that information on clients and indirect clients will only be assessed “where the information is available **to the CCP.**” Alternatively, where possible, ESMA could obtain such information from the TC-CCP’s regulator as a result of local trade reporting rules.

(II) Article 2: The effect of failure of or a disruption to a CCP

Recovery and resolution plans

Articles 2 (e) and (f) refer to recovery and resolution plans that will need to be considered by ESMA. We note that the global work on recovery and resolution planning remains ongoing, and not all jurisdictions have a finalized framework in place or they differ significantly across jurisdictions. We would appreciate further clarification of what needs to be considered by ESMA (i.e comparability to the EU’s framework with the framework of the third-country jurisdiction, whether the framework is in line with FSB and IOSCO guidance, etc).

Access to central bank facilities

- Whilst our members are of the view that there is a need for CCPs to have more access to central bank deposit accounts and liquidity facilities, it may create issues to include the analysis of the extent to which central bank money is accessible and available to CCPs in ESMA’s assessment of a TC-CCP’s systemic importance. Not all jurisdictions or central

banks allow CCPs to have access to central bank deposit and settlement services. Especially outside the EU, the use of commercial banking is more prevalent and follows a robust process. We suggest that the language of the final DA Tiering be clarified that ESMA should take into account any third-country rules and limitations for TC-CCPs to access central bank services for settlements, payments or particular currencies.

(i) Article 6: Indicators of minimum exposure of clearing members and clients established in the Union to the CCP

- When calculating the maximum open interest (**Article 6(a)**) or the maximum notional outstanding (**Article 6(b)**), it would be important to clarify whether those figures should be adjusted or not for market sensitivities such as delta (for options) and duration (for interest rate derivatives). In other EU regulations (e.g. 575/2013) such adjustments are made explicitly, and we recommend the Commission to follow the same approach when finalising the Delegated Acts.
- While it is implicit that the Commission in **Article 6(c)** refers to Initial Margin payments and that it is not intended to include Variation Margin payments, we recommend clarifying the language in the final DA Tiering.
- We assume that the calculation of the average aggregated margin requirements and default fund contribution will exclude pound sterling for the entire 2 year look back period in light of the United Kingdom's withdrawal from the European Union and final clarification would be helpful (**Article 6(c)**).
- When calculating the default fund contributions as required by the CCP, it would be important to clarify whether the intention is to use required or held figures in the default fund contributions (**Article 6(c)**). This would make the text compatible with Article 2(1)(c).
- In addition, further clarity may be required for ESMA on whether in relation to TC-CCPs any UK entities should be excluded from the calculation of these thresholds (as UK Clearing Member entities count towards the calculation until 31 January 2020). More clarity would also be required in the unlikely event, as it currently stands, of the current transition being extended beyond 31 December 2020.
- In addition, when calculating the average margin requirements and default fund contributions as per Article 6(c), we request that clearing members have to only take into account the house positions and payments linked to EU client clearing activities and not all client activity and it would be beneficial to clarify the language in the final DA Tiering.
- We suggest that further clarity is provided on the meaning of "payment obligation committed by entities" in terms of the method of calculation and the exact information to be included as required by **Article 6(d)**. As the criterion is linked to the default of any

one or two largest single clearing members (and their affiliates), which is covered by the default fund that is already included in Article 6(c), our members believe that this criterion is not related to the default fund, but intends to capture the liquidity needs that arise under a CCP's liquidity stress tests used to determine Cover 1 and 2 liquidity resources. These stress tests would determine the potential payment obligation EU clearing members would have to a CCP. Therefore, other unfunded obligations as part of the TC-CCP's default waterfall, such as assessments calls and recovery/resolution tools would not be included as these are not within extreme but plausible scenarios.

- We would welcome more clarity on how the input data is to be averaged, especially at which point currency conversion takes place and with application of what rates.
- When calculating the aggregate largest payment obligation, it would be important to clarify whether the figure is to be reported as the sum across the Union currencies, or individually to each of them (**Article 6(d)**).

4. Next steps: UK CCP Equivalence

As outlined above, we highly appreciate the Commission's efforts in finalising the Delegated Acts in order to complete the EMIR 2.2 framework. This also includes the Commission and ESMA's previous decisions to grant temporary equivalence and recognition respectively to UK CCPs.

All aspects of the framework are now close to being implemented but it is becoming clear that in the case of UK CCPs, finalisation of all required steps may not be in place in time before the end of the transition period, considering that the final Delegated Acts are subject to a scrutiny period by the European Parliament and Council, the time required for the UK CCPs to apply for recognition and ESMA to complete its assessment, including the enhanced assessment process for any CCP likely to be deemed as a Tier 2 TC-CCP.

Therefore, if equivalence decisions under the fully finalised EMIR 2.2 framework are not forthcoming, we would welcome confirmation from the Commission that it intends to adopt a temporary equivalence decision under the current framework for the UK's regulatory framework for CCPs, and that ESMA will grant temporary recognition until all steps of the new EMIR 2.2 framework for recognition of TC-CCPs by ESMA have been fully implemented and sufficient time has elapsed for the UK CCPs to make recognition applications and have these assessed and deliberated by ESMA.

It is important for the purpose of maintaining financial stability in the event of the UK leaving without an agreement at the end of the transition period on 31 December 2020 for the Commission to provide this certainty in a timely fashion.

We respectfully request the Commission to provide this confirmation well in advance of the end of September 2020 (when some UK CCPs would have to serve notices to cease clearing relationships for EU firms) in order to mitigate the effects on EU counterparties and clearing members in the event that UK CCPs cannot obtain EMIR recognition prior to 1 January 2021.

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](#).