

Global Markets Advisory Committee: EMIR 2.2 & ESMA's Related Draft Regulatory Requirements

September 2019

ESMA's Consultation on EMIR 2.2 Draft Regulatory Requirements

- Following the initial proposal to amend the supervisory framework for non-E.U. CCPs in the summer of 2017, political agreement was reached in March 2019 (i.e., “EMIR 2.2”)

- EMIR 2.2 is expected to be published in the Official Journal in 2019Q4

EMIR 2.2 materially changes the regulatory framework for non-E.U. CCPs, particularly where those CCPs are deemed systemically important to the EU

- Regulatory requirements need to be adopted by the European Commission (“EC”) covering:
 - **Tiering**: Determining whether a non-E.U. CCP is systemically important to the stability of the E.U. or one of its Member States
 - **Comparable Compliance**: If determined to be systemically important, how the non-E.U. CCP is able to comply with EMIR by complying with comparable home country regulatory requirements
 - **Fees**: Fees for non-E.U. CCPs to cover the expansion of the E.U.’s regulatory oversight
- Following a request from the EC for advice, the European Securities and Markets Authority (“ESMA”) publicly consulted on draft standards
 - ESMA’s consultation closed in July 2019

Tiering Proposal

The European Commission via EMIR 2.2 has created a framework for evaluating whether a non-E.U. CCP is “systemically important or likely to become systemically important for the financial stability of the E.U. or of one or more of its member states.”

- Tier 1 CCP versus Tier 2 CCP

- **Tier 1:** ESMA has determined that the non-E.U. CCP is not systemically important or likely to become systemically important
- **Tier 2:** ESMA has determined that the non-E.U. CCP is systemically important or likely to become systemically important

- Consequences of Tiering

- A non-E.U. CCP must be assessed by ESMA as Tier 1 or Tier 2 in order to offer its clearing services to E.U.-based clearing members and their clients
- If a non-E.U. CCP is deemed as Tier 2, the non-E.U. CCP will only be permitted to provide its clearing services to E.U.-based clearing members and clients if it meets additional conditions

- Criteria for Tiering

- EMIR 2.2 requires ESMA to take into account the following criteria in its determination of a non-E.U. CCP's systemic importance in Europe:
 - A. The nature, size and complexity of the non-E.U. CCPs business in the Union, and outside the E.U. to the extent its business may have a systemic impact on the E.U. or on one or more of its Member States
 - B. The effects a non-E.U. CCP's failure or disruption would have on the E.U.
 - C. A non-E.U. CCP's clearing membership structure
 - D. Alternatives for a non-E.U. CCP's clearing services on financial instruments denominated in E.U. currencies
 - E. A non-E.U. CCP's relationships, interdependencies, and other interactions to the extent they would have an impact on the financial stability of the E.U. or one of its Member States

Tiering Proposal

ESMA proposes to assess a non-E.U. CCP's tier by evaluating 14 indicators

The nature, size and complexity of the non-E.U. CCPs business in the Union	The effects a non-E.U. CCP's failure or disruption would have on the E.U.	A non-E.U. CCP's clearing membership structure	Alternatives for a non-E.U. CCP's clearing services on financial instruments denominated in E.U. currencies	A non-E.U. CCP's relationships, interdependencies, and other interactions
<p>Indicator 1: Assess the non-E.U. CCP's ownership, business, and corporate structure</p> <p>Indicator 2: Assess the financial instruments cleared by the non-E.U. CCP including: (i) whether they are subject to the clearing obligation in the E.U.; (ii) whether they are denominated in E.U. currencies; and (iii) their complexity, price volatility, and average maturity</p> <p>Indicator 3: Assess the value (e.g., notional outstanding) and volume cleared by the non-E.U. CCP in aggregate, for E.U. clearing members, and for non-E.U. clearing members where they clear on behalf of E.U. clients and E.U. indirect clients</p> <p>Indicator 4: Assess the transparency (e.g., availability of price information) and liquidity of the relevant markets</p> <p>Indicator 5: Assess the risk profile of the non-E.U. CCP</p>	<p>Indicator 6: Assess the non-E.U. CCP's margins, default fund contributions, and eligible collateral, including variation margin flows and initial margin and default fund collateral held and required: (i) in aggregate; (ii) for E.U. clearing members; and (iii) denominated E.U. currencies</p> <p>Indicator 7: Assess the non-E.U. CCP's liquidity resources, including the largest payment obligations in aggregate and E.U. currencies and related liquidity resources, as well as the amount of resources provided by E.U. entities</p> <p>Indicator 8: Assess the non-E.U. CCP's settlement and payments, including the use of central bank money for settlement and distributed ledger technology, as well as where payments are made in E.U. currencies</p> <p>Indicator 9: Assess the framework for recovery and resolution of the non-E.U. CCP, including available tools and the related maximum liability for an individual clearing member and all E.U. clearing members</p>	<p>Indicator 10: Assess and identify the non-E.U. CCP's clearing members, in particular its E.U. clearing members, E.U. clients, and E.U. indirect clients and their share of the CCP's total clearing activity</p> <p>Indicator 11: Assess the access to the non-E.U. CCP and its clearing services, including clearing membership requirements and grounds for denying access</p>	<p>Indicator 12: Assess if there are substitutes for the non-E.U. CCP's clearing services, including whether those services are offered to E.U. clearing members, E.U. clients, and E.U. indirect clients, for a trading venue that is authorized (or recognized), and for swaps subject to a clearing obligation</p>	<p>Indicator 13: Assess the non-E.U. CCP's outsourcing arrangements, including if arrangements have been outsourced to E.U. entities</p> <p>Indicator 14: Assess the non-E.U. CCP's links or connections with other financial market infrastructures, other financial institutions, and the broader financial system, including if the CCP clears for an E.U. trading venue, has interoperability arrangements with an E.U. CCP, and has links with E.U. central securities depositories or payment systems</p>

Comparable Compliance Proposal

Under ESMA's proposals, the comparable compliance assessment would be conducted at the CCP level on a "requirement-by-requirement" basis by mapping a given non-E.U. requirement to the corresponding EMIR requirement

The supervisory approach ESMA will take for each non-E.U. CCP once the comparable compliance assessment is complete remains unclear

ESMA's proposals categorize EMIR requirements as "core" or "non-core" requirements

Core Requirements: Non-E.U. requirements can only be considered comparable when they are assessed to ***always be equal or at least as strict or conservative*** as the corresponding EMIR core requirements and if this is not the case, the non-E.U. CCP must ***adopt the corresponding EMIR requirements as a floor or minimum***

Non-Core Requirements: Non-E.U. requirements can be considered comparable when they are similar as the corresponding EMIR non-core requirements if they substantially achieve the respective regulatory objectives of the EMIR requirements

- If comparable compliance is difficult to achieve, ESMA would consider whether the requirements achieve the regulatory objectives of the corresponding EMIR requirements and "effectively reflect the Union's interest as a whole"

Next Steps – Anticipated Timeline

The EC will need to finalize these regulatory requirements prior to EMIR 2.2 becoming applicable to non-E.U. CCPs

- **2019Q4**: EMIR 2.2 is published in the Official Journal – only applicable when related regulatory requirements are adopted by the EC
- **2019Q4**: ESMA is expected to submit its technical advice to the EC on the related regulatory requirements for EMIR 2.2
- **2019Q4-2020Q2**: The related regulatory requirements per Delegated Act for EMIR 2.2 are finalized by the EC following a consultation conducted by the EC (EP and Council have a 3 month period for non-objection)
- **2020Q1-2021Q2**: Determinations are made whether non-E.U. CCPs are systemically important to the E.U.
- Within 18 months the non-EU CCPs designated systemically important must adapt with core EMIR requirements