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**COMMISSION DELEGATED REGULATION (EU) .../...**

**of **XXX****

**supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to fees charged by the European Securities and Markets Authority to central counterparties established in third countries**

(Text with EEA relevance)

*This draft has not been adopted or endorsed by the European Commission. Any views expressed are the preliminary views of the Commission services and may not in any circumstances be regarded as stating an official position of the Commission.*

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE DELEGATED ACT**

Regulation (EU) 2019/2099 amending Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories<sup>1</sup> (European Market Infrastructure Regulation, ‘EMIR’), was published in the Official Journal of the European Union on 12 December 2019<sup>2</sup>.

In relation to third-country CCPs, the main objective of the amendments to EMIR is to ensure a more robust and effective supervision of central counterparties (CCPs) established in third countries offering services to the Union, including an enhanced role and additional tasks for the European Securities and Markets Authority (‘ESMA’). As part thereof, the ‘CCP Supervisory Committee’ is established and will prepare decisions to be taken by ESMA’s Board of Supervisors, and a new ‘Third-country CCP college’ will ensure that all relevant Union stakeholders are properly informed and involved. Moreover, Regulation (EU) 2019/2099 introduces a two-tier system for third-country CCPs, where CCPs that are systemically important for the financial stability of the Union or of one or more of its Member States (‘Tier 2 CCPs’) must comply with EMIR requirements and be subject to ESMA’s supervision. Tier 2 CCPs in third countries with comparable requirements may be deemed to comply with EMIR requirements through compliance with its home rules (‘comparable compliance’). Third-country CCPs that are not systemically important (‘Tier 1 CCPs’) will – as today – be allowed to offer clearing services in the Union relying on compliance with their home rules declared equivalent under the Commission implementing act, but will be subject to a periodic review of their systemic importance.

As provided in Article 25d of EMIR, ESMA should charge fees to third-country CCPs to cover all costs incurred for the recognition and the performance of its tasks in relation to third-country CCPs.

Article 25d of EMIR empowers the Commission to adopt a delegated act in order to specify further the types of fees, the matters for which fees are due, the amount of the fees and the manner in which fees are to be paid by third-country CCPs that apply for recognition and by recognised third-country CCPs.

The delegated act is to be adopted in accordance with Article 82 of EMIR and Article 290 of the Treaty on the Functioning of the European Union.

### **2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT**

#### ***Procedural aspects***

On 3 May 2019, the Commission asked ESMA for its views (‘technical advice’) on a Commission delegated act specifying further the fees to be charged to third-country CCPs to be adopted in accordance with Article 25d(3) of EMIR.

ESMA conducted a public consultation on its draft technical advice from 29 May to 29 July 2019. 9 respondents to the consultation gave public feedback, other respondents replied on a confidential basis. The non-confidential responses to the consultation are published on ESMA’s website<sup>3</sup>. ESMA sent its technical advice to the Commission on 11 November 2019.

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<sup>1</sup> OJ L 201, 27.7.2012, p. 1.

<sup>2</sup> OJ L 322, 12.12.2019, p. 1.

<sup>3</sup> <https://www.esma.europa.eu/press-news/consultations/esma-fees-third-country-ccps-under-emir-22>

On 21 October 2019, the Commission consulted the Expert Group of the European Securities Committee (EGESC) on the provisional content of this delegated act. The EGESC comprises representatives of Member States, the European Central Bank, the Secretariat of the European Parliament's Committee on Economic and Monetary Affairs, and ESMA.

### *Stakeholder views*

As a result of the abovementioned consultations as well as ad hoc contributions, the Commission received a wide range of views on the content of the delegated act. Those views mainly expressed the need to ensure proportionality of fees to tasks carried out and to the turnover of CCPs, the need to ensure that fees are predictable, and the need for transparency and justifications of fees.

#### *Need to ensure proportionality of fees to tasks carried out and to the turnover of CCPs*

Most stakeholders supported the fee structure, with a basic recognition fee to be paid by all third-country CCPs applying for recognition, an additional recognition fee for Tier 2 CCPs, a separate fee for comparable compliance request by Tier 2 CCPs combined with a possible reduction of the recognition fee and a discount of the annual fee, and differentiated Tier 1 CCP and Tier 2 CCP annual fees. Many stakeholders also agreed that CCPs that become Tier 2 CCPs should pay a top-up fee reflecting the difference between the Tier 1 and Tier 2 fees. Stakeholders also supported the principle that annual fees in the year of recognition are calculated in proportion to the time period remaining until the end of the calendar year.

While some stakeholders considered that EUR 50 000 for a recognition fee and EUR 50 000 for annual fees for Tier 1 CCPs was acceptable, others found the fees too high, arguing that they could be a barrier to entry for smaller CCPs. Others argued that the level of the recognition fee should depend on the purpose of the application for recognition, i.e. whether the CCP intends to offer clearing services in the Union or applies solely in order to obtain beneficial treatment under the Capital Requirements Regulation<sup>4</sup>. In general, stakeholders argued that fees should be proportionate to the role of ESMA as a host supervisor and not lead supervisor. Some stakeholders argued that fees should be aligned with fees charged to CCPs in third countries or in Member States.

As concerns the EMIR requirement that fees should be proportionate to the turnover of CCPs, replies were mixed. Some stakeholders supported the costs being split equally between Tier 2 CCPs, arguing that turnover does not necessarily reflect the supervisory efforts required. Others argued that the turnover requirement in Article 25d of EMIR could not be disregarded. On the one hand, some stakeholders advocated the need to take into account the turnover related to clearing services provided to Union clearing members or counterparties or for financial instruments in Union currencies. On the other hand, other stakeholders noted the complexity and administrative burden associated with collecting and processing the information required for assessing turnover related to clearing services in the Union or in Union currencies, while not accurately reflecting the size of CCPs.

Most stakeholders supported a discount in the annual fee for Tier 2 CCPs that are granted comparable compliance, arguing for a differentiated discount depending on the scope of comparable compliance, however one stakeholder noted the risk of distorting the level playing field.

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<sup>4</sup> OJ L 176, 27.6.2013, p. 1.

Most stakeholders strongly opposed a specific fee for the withdrawal of recognition. Although, stakeholders generally agreed that recognition fees would not be reimbursed in case the application is withdrawn, at least not in full.

#### *Need to ensure predictability of fees*

Stakeholders argued that recognition fees should be paid after the tiering of CCPs, either on recognition or in instalments upon the achievement of specified predefined milestones. Stakeholders supported the proposal that annual fees are to be paid in advance of, or at the latest in the first quarter of, the calendar year to which they relate. At the same time, several stakeholders underlined the need of predictability and some stakeholders stressed that annual fees need to be set sufficiently in advance for CCPs to be able to include them in their budgets. Some stakeholders also argued that fees should only be levied as of the entry into force of the delegated acts allowing ESMA to tier and recognise CCPs under the framework laid down in Regulation (EU) 2019/2099. A few stakeholders argued that recognition fees should not be paid by CCPs that are already recognised by ESMA when Regulation (EU) 2019/2099 enters into force.

#### *Need to provide transparency and justification of fees*

Many stakeholders asked for more transparency and justifications about ESMA's costs and need for resources to perform its tasks. Some stakeholders also objected to the principle of funding ESMA with fees paid by CCPs, alleging a conflict of interest in determining third-country CCPs as Tier 2 to expand its resources and activities in relation both to third-country CCPs and CCPs established in the Union.

### **3. IMPACT ASSESSMENT**

The Commission must specify further the types of fees, the matters for which fees are due, the amount of the fees and the manner in which fees are to be paid by third-country CCPs that apply for recognition and that are recognised. According to Article 25d, fees should be proportionate to the turnover of CCPs and cover all costs incurred by ESMA for the recognition and the performance of its tasks in relation to third-country CCPs under EMIR.

#### ***Commission considerations***

The Commission has fully considered all representations received, including the technical advice provided by ESMA and the responses to ESMA's public consultation, the feedback received from the EGESC, as well as other input provided to the Commission by stakeholders. On this basis, the Commission is proposing the adoption under Article 25d(3) of EMIR of this delegated act further specifying the types of fees, the matters for which fees are due, the amounts of the fees and the manner in which fees are to be paid by third-country CCPs.

This delegated act deviates from the technical advice received from ESMA in certain ways in order to enhance the proportionality and predictability of the fees: recognition fees are on total lower as costs related to comparable compliance will be covered by the additional recognition fee charged to Tier 2 CCPs; comparable compliance will not result in a discount to the Tier 2 CCP annual fees, as ESMA remains responsible for the supervision of Tier 2 CCP on an ongoing basis, whether comparable compliance is granted or not; Tier 1 CCP annual fees will be set annually on the basis of ESMA's activity-based budget; and Tier 2 CCP annual fees will take into account the turnover of CCPs.

ESMA's technical advice carefully assesses the impact of the different options considered in the advice. Against this background and taking into account that the Commission's deviations

should in principle reduce the administrative burden and costs for third-country CCPs compared to ESMA's technical advice, the Commission has not prepared a separate impact assessment. Nevertheless, this Section and Section 3.2 below assess the positive and negative impacts of the changes introduced by the Commission and analyse the costs and benefits of the measures proposed.

Quantitative data on the costs and benefits is limited and cannot always be disclosed due to its confidential nature. ESMA asked for quantitative data as part of its public consultation but received very limited feedback. In any case, the differences amongst third-country CCPs are such that the costs and benefits of the changes will vary considerably, e.g. depending on how much information is already publically available or has already been provided to ESMA or depending on the size and complexity of a third-country CCP.

### *Proportionality*

Fees should be based on ESMA's costs and tasks, which is ensured in this delegated act in several ways.

First, the Commission proposes differentiated fees for Tier 1 and Tier 2 CCPs. This reflects ESMA's different tasks and thus costs in relation to Tier 1 and Tier 2 CCPs. For example, while ESMA will have to check the completeness of applications, draft decisions and assess the systemic importance of both Tier 1 and Tier 2 CCPs applying for recognition, the assessment of compliance with the additional recognition requirements in Article 25(2b) of EMIR and requests for comparable compliance will create additional costs in respect of Tier 2 CCPs. Also for all recognised third-country CCPs some tasks will be the same for Tier 1 and Tier 2 CCPs (the periodic review of the tiering, cooperation arrangements with third-country supervisors, monitoring of regulatory and supervisory developments in third countries), however, ESMA will have the additional task for Tier 2 CCPs to supervise on an ongoing basis their compliance with the requirements set out in Article 16 and Titles IV and V of Regulation (EU) No 648/2012, including through comparable compliance, where granted. The approach to apply differentiated fees was supported by Member States in the EGESC. The alternative advocated by some stakeholders, i.e. that all CCPs contribute equally to ESMA's costs, would not seem appropriate, as Tier 1 CCPs, which are less systemic for the EU and its Member States, would pay the higher costs of recognising and supervising Tier 2 CCPs, which are systemic for the Union or one or more of its Member States.

Second, the Commission proposes a simple fee structure, minimising the different types of fees available to what is strictly necessary. That fee structure should consist only of recognition fees and annual fees, reflecting the legal requirement in EMIR.

The Commission believes that recognition fees should cover the administrative costs of recognition (e.g. file processing), the costs of tiering and, for Tier 2 CCPs, the costs of assessing the recognition requirements set out in Article 25(2b) of EMIR and comparable compliance, if applied for at recognition.

Basic recognition fees should be paid by all CCPs when applying for recognition. They should reflect the basic administrative tasks to be performed by ESMA when assessing a third-country CCP's request for recognition. They should also reflect the fact that ESMA needs to collect and analyse information provided by third-country CCPs to determine whether or not they are Tier 1 or Tier 2.

In addition to the basic recognition fee, Tier 2 CCPs should pay a supplementary 'top-up' recognition fee. That additional recognition fee should also be paid by recognised CCPs that become Tier 2 CCPs, either following the initial tiering of recognised CCPs after the entry into force of Regulation (EU) 2019/2099, or following a subsequent periodic review. This fee

reflects the additional information to be collected and analysed by ESMA for Tier 2 CCPs, and includes the costs related to the assessment of comparable compliance. Including assessment of comparable compliance in the recognition fee offers several advantages, such as simplicity (almost all Tier 2 CCPs are expected to apply for comparable compliance given the benefits it offers) and the substantial synergies in the assessment of recognition requirements (in particular where there are conditions) and comparable compliance.

Annual fees should also be paid by all third-country CCPs. However, the fee for Tier 1 CCPs and the fee for Tier 2 CCPs should differ. ESMA's annual fees will be based on its work programme and expected costs, and will therefore be proportionate to its level of activity. Costs related to the assessment of comparable compliance after the moment of recognition should be covered by the annual fees. Any such requests are expected to be exceptional, as it is highly likely that CCPs will request comparable compliance at the time of application for recognition due to its benefits for Tier 2 CCPs. Moreover, the notion of any potential discounts is misleading as under EMIR, ESMA remains responsible for the ongoing supervision of CCP's compliance with the recognition requirements, whether comparable compliance is granted or not.

Finally, regarding annual fees in the year of recognition, the Commission proposes to calculate those annual fees as a proportion of the basic and additional recognition fees charged to Tier 1 and Tier 2 CCPs.

#### *Fees proportionate to turnover*

Article 25d of EMIR requires that the fees charged to third-country CCPs are proportionate to the turnover.

In order to comply with that requirement in a proportionate manner, several aspects need to be taken into consideration. On the one hand, there are costs involved for third-country CCPs to provide annual information on turnover that is relevant and comparable across third-country CCPs. Thus, in principle, the fee should accurately reflect the size of third-country CCPs in the context of EMIR without creating an undue burden on CCPs to provide the information or on ESMA to analyse it. The way in which turnover is reflected in the fee should also be comparable between third-country CCPs and must take into account that such CCPs are established in different jurisdictions with accounting practices that might also differ.

In this respect, several different measurements for turnover may be considered: global and total revenues of a CCP from all of its lines of business; CCPs' global revenues from clearing services; or CCP's revenues from clearing services generated in the Union or in respect of financial instrument in Union currencies. Global and total revenues should be relatively simple to find, e.g. in annual reports. Nevertheless, it may be overreaching to look at total revenues, as those could include revenues from lines of business other than clearing, depending on the corporate structure of CCPs. In this respect, comparing CCPs' revenues from clearing services in general (e.g. membership fees and clearing fees, net of transaction costs) would seem more appropriate in the context of EMIR.

Looking at revenues from clearing services generated in the Union or in respect of financial instrument in Union currencies could also amount to appropriate criteria to reflect turnover. Such information is not however readily available. It could involve significant administrative burden for third-country CCPs to provide such information in a standardised manner, and for ESMA to analyse it. The Commission therefore proposes to compare CCPs' global revenues from clearing services as an appropriate proxy for reflecting turnover in the fees to be paid by third-country CCPs. To simplify and reduce the reporting burden, the Commission proposes to look at revenues in the CCP's most recent reporting year, despite the fact that reporting

years and accounting standards may differ between CCPs. The relevant information should be readily available to CCPs and possibly even be a public figure in annual reports.

In order to further standardise the comparison between third-country CCPs and enhance predictability, the Commission proposes to introduce ranges within which Tier 2 CCPs will be charged the same fee. In that way, fees could reflect the turnover of CCPs in a workable manner without resulting in an unjust fee being charged as a result of imperfect comparisons of turnover.

The annual tasks in relation to recognised Tier 1 and Tier 2 CCPs differ considerably. While ESMA's tasks in relation to Tier 2 CCPs are larger and more complex, ESMA's tasks in relation to Tier 1 CCPs will be relatively standardised across Tier 1 CCPs, regardless of their size. Turnover should not therefore be reflected in the annual fees for Tier 1 CCPs in the same way than for Tier 2 CCPs. Tier 1 CCP annual fees are expected to be substantially lower than the fees charged to Tier 2 CCP, thereby reflecting the lower turnover of Tier 1 CCPs.

In addition, since it is expected that there will be more Tier 1 CCPs than Tier 2 CCPs, the administrative burden for ESMA, as well as for third-country CCPs, will be better reflected if turnover is only explicitly used for calculating fees in relation to Tier 2 CCPs.

The Commission therefore considers appropriate to provide for a flat annual fee for Tier 1 CCPs, which reflects ESMA's costs connected to the activity of Tier 1 CCPs split equally between all recognised Tier 1 CCPs.

For Tier 2 CCPs, the Commission considers that annual fees should be set in explicit proportion to the turnover of CCPs, reflecting ESMA's expected costs for Tier 2 CCPs. For the sake of simplicity and to minimise the impact of a potential lack of comparability, Tier 2 CCPs should be divided into two broad groups reflecting their worldwide turnover accrued from the provision of clearing services. CCPs within one and the same group would be charged the same annual fee, but instead of splitting costs equally between all third-country CCPs, the CCPs in the lower range would be attributed a turnover weight of 1.0 and CCPs in the higher range a turnover weight of 1.2.

### *Predictability*

Stakeholders advocated that fees should (1) to the extent possible, be predictable for third-country CCPs, and (2) should not apply retroactively.

Concerning recognition fees, the tasks and the work are, to a large extent, foreseeable. As such, recognition fees (i.e. both the basic recognition fee and the 'top-up' additional recognition fee for Tier 2 CCPs) should be set in the delegated act based on ESMA's past experience and expectations as reflected in its work programme and activity-based budget. This offers third-country CCPs clear predictability.

Concerning annual fees, a balance should be struck between achieving the same degree of predictability while ensuring that the fees reflect the costs of ESMA performing its annual tasks (e.g. maintaining cooperation arrangements with third-country supervisors, monitoring regulatory and supervisory developments, reviewing the tiering, supervising on an ongoing basis Tier 2 CCPs). In line with the approach used for trade repositories and credit ratings agencies, and in order to enable the fee to reflect the costs incurred by ESMA, the annual fees should be set annually on the basis of ESMA's work programme and activity-based budget. This approach should apply to both Tier 1 and Tier 2 CCPs. Proposals by some to fix the Tier 1 annual fees in the delegated act while varying the Tier 2 CCP annual fees runs the risk that Tier 2 CCPs potentially cross-subsidise the lower fees of Tier 1 CCPs (and vice-versa). This can be avoided if annual fees for both Tier 1 and Tier 2 CCPs are determined annually on the basis of ESMA's work programme and budget.

The procedure for fixing annual fees is transparent and predictable. ESMA presents its annual work programme together with its estimated costs and draft budget in September each year. That gives a first indication of the levels of fees. The approved budget is published on ESMA's website and in the Official Journal of the EU in the beginning of the calendar year to which it relates. ESMA will be required to send debit notes to third-country CCPs specifying the amount of the annual fee 30 days in advance to the due date.

#### *Transparency and justification of fees*

Article 25d of EMIR requires ESMA to charge third-country CCPs fees to cover all costs incurred by it for the recognition and the performance of its tasks in relation to third-country CCPs under EMIR. Fees should however, be limited to costs incurred in relation to third-country CCPs, and should not cover costs for tasks carried out in relation to CCPs established in the Union, which will be covered by contributions from national public authorities and subsidies from the Union. Moreover, ESMA's budget is set in relation to the expected level of activity in relation to Tier 1 and Tier 2 CCPs in the coming year. In other words, fees are charged to cover ESMA's expected costs, not to expand its activity. ESMA is a public authority and, as such, under the highest level of scrutiny. Its budget is audited annually by the European Court of Auditors.

Fees should also be carefully calibrated so as to avoid structural budgetary unbalances – deficits or surpluses. Although ESMA is expected to draw lessons for coming years and recalibrate its budgets where deficits or surpluses are repeated or significant, no extra fees are collected to cover deficits, and surpluses are not paid back.

Stakeholders also asked for more similarity with the fees charged by other regulators and supervisors. Authorities in Canada, Hong Kong, Australia and Singapore charge fees of varying levels to domestic and foreign CCPs. In the United Kingdom authorisation fees charged to UK CCPs vary between approximately EUR 5 500 and EUR 330 000. Within the Union, in Sweden authorities charge authorisation fees to domestic CCPs that vary between approximately EUR 6 300 and EUR 820 000, and authorities in Germany, Spain, Greece and Poland also charge authorisation fees to domestic CCPs (between EUR 4 500 and EUR 150 000, depending on the authority). Other Member State authorities do not charge authorisation fees. In any case, these figures also reflect the different funding models of different bodies (e.g. it is more common in Europe to have fee based funding models), as well as the different supervisory approach to risk and the administrative and supervisory costs. According to the information available to the Commission, the level of fees in this delegated act would not be unprecedented<sup>5</sup>.

### **3.1. Analysis of costs and benefits**

ESMA will incur costs associated with the recognition and the performance of its tasks under EMIR in relation to third-country CCPs. EMIR requires that ESMA charge fees to third-country CCPs to cover those costs. Fees should be proportionate to the turnover of CCPs.

The Commission has, based on information provided by ESMA, assessed the potential level of work involved as well as the different underlying assumptions. The Commission has also reviewed on a granular level ESMA's cost estimates underlying its technical advice.

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<sup>5</sup> ESMA technical advice, [https://www.esma.europa.eu/sites/default/files/library/esma70-151-2650\\_final\\_report\\_on\\_ta\\_on\\_emir\\_2\\_2\\_ccp\\_fees.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-151-2650_final_report_on_ta_on_emir_2_2_ccp_fees.pdf)



## Methodology

3 categories of costs are considered: specific variable costs, allocated variable costs and fixed costs.

- **Specific variable costs** (full-time equivalents (FTEs) per CCP) cover specific tasks for each third-country CCP (e.g. the review of the completeness of an application for recognition);
- **Allocated variable costs** (FTE per CCP) cover specific tasks to be carried out by ESMA for all third-country CCPs in the same jurisdiction (e.g. the conclusion of cooperation arrangements with a third-country authority); and
- **Fixed costs** cover aspects such as the investment and maintenance of specific IT developments for all third-country CCPs and the cost of the CCP Supervisory Committee, including of the Chair and the two independent members. Those costs are estimated at a certain amount which is then allocated to each CCP

For the purpose of setting the level of the basic and additional recognition fees, standard average costs<sup>6</sup> of EUR 172 125 per full time equivalent (FTE) for a Temporary Agent and EUR 95 620 for a national expert of a Member State seconded to ESMA are used for the estimation. The standard average costs includes provisions for salary and other allowances, pension and healthcare contributions as well as other costs indispensable for the performance of the duties of the relevant staff member (facility management services, training, missions, building rent and maintenance, IT systems/equipment) and takes into account national experts of Member States seconded to ESMA. The cost of overheads has to be added to that average cost per FTE. The costs for the Chair and independent members of the CCP Supervisory Committee is estimated at approximately EUR 1 million annually, of which a proportion should be covered by fees paid by third-country CCPs. In addition, the investment into a specific IT tool to take over the new mandate in relation to third-country CCPs will be significant.

The levels of fees proposed in this delegated act are based on several key assumptions regarding costs which are in line with those used by ESMA in its technical advice, in particular:

- the number of third-country CCPs that will apply for recognition and be recognised under EMIR 2.2 and that will be tiered as Tier 1 or Tier 2. To test this assumption, the Commission ran several different scenarios with different numbers of CCPs tiered as Tier 1 or Tier 2; nevertheless the overall impact on the level of fees was negligible;
- the allocation of the fixed costs is evenly shared: the cost for each Tier 1 CCP and each Tier 2 CCP is the same in a given year; and
- the CCP Supervisory Committee will focus most of its time on third-country CCPs (recognition, tiering and then supervision of) – and therefore a large part of the costs for the Chair and the independent members should be allocated to third-country CCPs.

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<sup>6</sup> Standard per FTE average costs applicable in 2020 for the estimation of the direct costs to the European Commission.

### Recognition fees

The Commission estimates the costs to process recognition applications (assessing the completeness of the application, requesting additional information if needed, drafting of the decision) and the costs relating to the tiering of third-country CCPs would be approximately EUR 50 000. According to the Commission's calculations on basis of the costs described above, that corresponds to approximately 2 FTEs for a period of 1.5 months, as well as an allocation of fixed costs.

Applications for recognition by Tier 2 CCPs will entail additional costs (requesting additional information) as well as more substantial work (consultation of third-country authorities, consultation of central banks of issue, assessment of the additional recognition requirements, including CCPs' compliance with Article 16 and Titles IV and V of Regulation (EU) No 648/2012, assessment of requests for comparable compliance) and the higher involvement of the CCP Supervisory Committee. The additional costs are estimated at EUR 360 000. That corresponds to approximately 2 FTEs (annually), as well as an allocation of fixed costs, including that of the CCP Supervisory Committee. The amount reflects inter alia the simpler and more proportionate approach to comparable compliance.

The Commission therefore proposes a basic recognition fee of EUR 50 000 to be charged to all third-country CCPs applying for recognition, and an additional recognition fee of EUR 360 000 to be charged to Tier 2 CCPs.

### Annual fees

The Commission proposes that the annual fees for both Tier 1 and Tier 2 CCPs are determined annually on the basis of ESMA's annual work programme and budget.

ESMA's budget is based on costs per activity. The budget identifies the costs for the number of FTEs needed to perform ESMA's tasks, related logistics, IT, communication and general costs, as well as fixed costs. The correct implementation of the budget is audited by the European Court of Auditors. Annual fees determined on that basis therefore ensure that costs are transparent and that fees are aligned with ESMA's costs.

The annual fees for Tier 1 and Tier 2 CCPs should cover:

- ongoing activities, such as the ongoing supervision of third-country CCPs, the cooperation with third-country authorities and the monitoring of regulatory and supervisory developments in third countries;
- periodic activities, such as the regular review of the tiering of CCPs (as required in EMIR) and the assessments required in case of an extension of activities or services;
- the allocation of fixed cost (IT, CCP Supervisory Committee).

For Tier 1 CCPs, the Commission estimates the total annual fee at approximately EUR 50 000 per CCP. This is in line with ESMA's estimates provided in the technical advice. Nevertheless, it is important to underline that this is not a fixed annual amount but linked to the tasks and costs associated with Tier 1 CCPs. As such, the annual fees for Tier 1 CCPs will vary over time.

For Tier 2 CCPs, the Commission assumes that the supervision tasks will be the same for ESMA regardless whether or not the CCP was granted comparable compliance. In order to reflect turnover, Tier 2 CCPs will be placed into one of two groups.

CCPs are likely to pass on their costs – to varying degrees and in different ways – to their clearing members and clients, and in any event the amount should be offset by the benefits

resulting from access to the Union clearing members and trading venues and the beneficial treatment under the Capital Requirements Regulation.

### **3.2. Proportionality**

This Regulation lays down the fees to be paid by third-country CCPs, specifying their types, the matters for which they are due, the amounts of the fees and the manner in which they are to be paid. The objective of the fees is to fully cover ESMA's costs for the recognition and the performance of its tasks in relation to third-country CCPs under EMIR. Fees should be carefully calibrated to cover all of ESMA's costs, without resulting in budgetary surpluses or deficits. While fees should be proportionate to the turnover of CCPs, their implementation should not result in undue burdens on third-country CCPs or on ESMA. The fees laid down in this delegated act meet those objectives and are therefore proportionate.

In view of the above, this delegated act ensures the proportionate application of EMIR, thereby taking into account the principle of proportionality.

### **3.3. Subsidiarity**

This delegated act lays down the fees ESMA should charge to third-country CCPs to cover its costs for performing its tasks in relation to such CCPs under EMIR. Member States cannot take actions to lay down fees that ESMA should charge to third-country CCPs. This delegated act complements EMIR, whilst respecting the principle of proportionality as set out above, and therefore is in line with the principle of subsidiarity.

## **4. LEGAL ELEMENTS OF THE DELEGATED ACT**

Chapter I of the proposed delegated regulation lays down the types of fees to be charged to third-country CCPs:

- Article 1 specifies the one-off basic recognition fees to be charged to all third-country CCPs applying for recognition, independently of their systemic importance to the Union or its Member States (paragraph 1), as well as the additional one-off recognition fees to be charged to systemically important third-country CCPs to cover the extra costs to process such applications (paragraph 2);
- Article 2 specifies how to determine the annual fees to be charged to recognised third-country CCPs depending on the systemic importance of CCPs on the basis of ESMA's expected costs and its activity-based budget;
- Article 3 specifies how to calculate the (reduced) annual fees to be charged to third-country CCPs in the year in which they are recognised;
- Article 4 specifies how to take into account the turnover of systemically important CCPs for the purpose of setting the annual fees charged to them.

Chapter II defines the payment modalities and the principle of non-reimbursement of fees, in particular:

- Article 5 specifies the general payment modalities: payments have to be made in euro and penalties are to be imposed in case of late payment;
- Article 6 specifies the payment modalities for recognition fees and that they are to be paid before ESMA carries out the assessment whether the recognition requirements are fulfilled and are not reimbursed;
- Article 7 specifies the payment modalities for annual fees and that they are to be paid in advance of the calendar year to which they relate and are not reimbursed.

Chapter III provides for transitional and final provisions:

- Article 8 specifies the payment modalities for recognition fees for third-country CCPs that have applied for recognition before the entry into force of the delegated act;
- Article 9 specifies the interim annual fees to be paid by CCPs recognised before the entry into force of Regulation (EU) 2019/2099 amending EMIR;
- Article 10 lays down the date of entry into force of the delegated act.

DRAFT

**COMMISSION DELEGATED REGULATION (EU) .../...**

**of XXX**

**supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to fees charged by the European Securities and Markets Authority to central counterparties established in third countries**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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<sup>7</sup>, and in particular Article 25d(3) thereof,

Whereas:

- (1) Article 25d of Regulation (EU) No 648/2012 requires that the European Securities and Markets Authority ('ESMA') charge third-country central counterparties ('CCPs') fees associated with applications for recognition under Article 25 of that Regulation and annual fees associated with the performance of its tasks in accordance with that Regulation in relation to recognised third-country CCPs. Article 25d(2) of Regulation (EU) No 648/2012 requires that such fees be proportionate to the turnover of the CCP concerned and cover all costs incurred by ESMA for the recognition and the performance of its tasks in relation to third-country CCP in accordance with that Regulation.
- (2) Fees associated with applications for recognition ('recognition fees') should be charged to third-country CCPs to cover ESMA's costs for processing applications for recognition, including costs for verifying that applications are complete, requesting additional information, drafting of decisions and costs relating to the assessment of the systemic importance of third-country CCPs ('tiering'). For CCPs that are systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States and that are recognised by ESMA in accordance with Article 25(2b) of Regulation (EU) No 648/2012 ('Tier 2 CCPs'), additional costs are incurred by ESMA. These additional costs are incurred by ESMA when assessing compliance with the recognition conditions set out in Article 25(2b) of Regulation (EU) No 648/2012 and whether, by complying with the applicable third-country legal framework, a CCP may be deemed to satisfy compliance with the requirements set out in Article 16 and Titles IV and V of Regulation (EU) No 648/2012 ('comparable compliance'). The costs associated with applications made by Tier 2 CCPs will therefore be higher than those associated with applications made by third-country CCPs that are not deemed to be systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States ('Tier 1 CCPs').

<sup>7</sup>

[OJ L 201, 27.7.2012, p. 1.](#)

- (3) While a basic recognition fee should be charged to all third-country CCPs applying for recognition under Article 25 of Regulation (EU) No 648/2012, an additional fee should be charged to Tier 2 CCPs to cover the additional cost incurred by ESMA as part of the application process. The additional recognition fee should also be charged to already recognised CCPs the first time that ESMA determines whether they are to be classified as Tier 2 CCPs following the review of their systemic importance under Article 25(5) or Article 89(3c) of Regulation (EU) No 648/2012.
- (4) Annual fees are also to be charged to recognised third-country CCPs to cover ESMA's costs for the performance of its tasks under Regulation (EU) No 648/2012 in relation to such CCPs. For both Tier 1 and Tier 2 CCPs, those tasks include the periodic review of the systemic importance of CCPs pursuant to Article 25(5) of Regulation (EU) No 648/2012, the implementation and maintenance of cooperation arrangements with third-country authorities and the monitoring of regulatory and supervisory developments in third countries. For Tier 2 CCPs, ESMA is also required to supervise on an ongoing basis compliance by those CCPs with the requirements set out in Article 16 and Titles IV and V of Regulation (EU) No 648/2012, including through comparable compliance, where granted. It is therefore appropriate that different annual fees apply to Tier 1 and Tier 2 CCPs.
- (5) The recognition and annual fees laid down in this Regulation should cover the costs that ESMA expects to incur when processing applications for recognition on the basis of its experience in performing tasks in relation to third-country CCPs and other supervised entities as well as on the basis of its expected costs as stated in its annual activity-based budget.
- (6) The tasks performed by ESMA under Regulation (EU) No 648/2012 in relation to recognised Tier 1 CCPs will largely be the same for each Tier 1 CCP independently of their size. It is therefore appropriate that the costs incurred by ESMA in relation to recognised Tier 1 CCPs are covered by levying an annual fee of the same amount on each recognised Tier 1 CCP. In relation to recognised Tier 2 CCPs, in order to ensure a fair allocation of fees which, at the same time, reflects the actual administrative effort required by ESMA for the performance of its tasks with respect to each Tier 2 CCP, annual fees should also take account of the turnover of the Tier 2 CCP.
- (7) Annual fees charged to third-country CCPs for the first year in which they are recognised pursuant to Article 25 of Regulation (EU) No 648/2012 should be proportionate to the part of that year during which ESMA performs tasks in accordance with that Regulation in relation to those CCPs. The same principle should apply for the year in which a CCP that is recognised as a Tier 1 CCP, is classified for the first time as a Tier 2 CCP pursuant to Article 25(5) of that Regulation.
- (8) To ensure the timely funding of the costs incurred by ESMA in relation to applications for recognition made pursuant to Article 25 of Regulation (EU) No 648/2012, recognition fees should be paid to ESMA before the processing of applications for recognition or the assessment of whether Tier 2 CCPs comply with the recognition requirements set out in Article 25(2b) of Regulation (EU) No 648/2012. In order to ensure the timely funding of the costs incurred by ESMA in the performance of its tasks in relation to recognised third-country CCPs, annual fees should be paid in the beginning of the calendar year to which they relate. Annual fees in the first year of recognition should be paid soon after the adoption of recognition decisions.
- (9) In order to discourage repeated or unfounded applications, recognition fees should not be reimbursed in the case where an applicant withdraws its application. As the

administrative work required in the case of an application for recognition that is refused is the same as that required in the case of an application that is accepted, recognition fees should not be reimbursed if recognition is refused.

- (10) Any costs incurred by ESMA after the entry into force of Regulation (EU) No 2019/2099 in respect of third-country CCPs that have already been recognised in accordance with Article 25 of Regulation (EU) No 648/2012 prior to [*PO, please insert the date of entry into force of this Regulation*] should be covered by fees. Such third-country CCPs should therefore be required to pay an interim annual fee for 2020 and each subsequent year until the review of their systemic importance pursuant to Article 89(3c) of Regulation (EU) No 648/2012 has been carried out.
- (11) This Delegated Regulation should enter into force as a matter of urgency to ensure that ESMA is funded in a timely and appropriate manner following the entry into force of Regulation (EU) 2019/2099,

HAS ADOPTED THIS REGULATION:

## CHAPTER I

### FEES

#### *Article 1*

#### ***Recognition fees***

1. A CCP established in a third country that applies for recognition in accordance with Article 25 of Regulation (EU) No 648/2012 shall pay a basic recognition fee of EUR 50 000.
2. A CCP established in a third country shall pay an additional recognition fee of EUR 360 000 where ESMA determines that, in accordance with Article 25(2a) of Regulation (EU) No 648/2012, that CCP is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States ('Tier 2 CCP'). A Tier 2 CCP shall pay the additional recognition fee in any of the following cases:
  - (a) the CCP applies for recognition;
  - (b) the CCP, where already recognised pursuant to Article 25(2) of Regulation (EU) No 648/2012, is determined to be a Tier 2 CCP following the review carried out by ESMA in accordance with Article 25(5) of that Regulation.

#### *Article 2*

#### ***Annual fees***

1. A recognised CCP shall pay an annual fee.
2. Where a CCP is recognised by ESMA in accordance with Article 25(2) of Regulation (EU) No 648/2012 ('Tier 1 CCP'), the annual fee for each Tier 1 CCP for a given year (n) shall be the total annual fee divided in equal parts between all Tier 1 CCPs recognised on 31 December of the previous year (n-1).

For the purposes of the first subparagraph, the total annual fee for a given year (n) shall be the estimate of expenditure relating to the tasks to be performed by ESMA with regard to all recognised Tier 1 CCPs under Regulation (EU) No 648/2012 as included in ESMA's budget for that year.

3. Where a CCP is recognised by ESMA in accordance with Article 25(2b) of Regulation (EU) No 648/2012 ('Tier 2 CCP'), the annual fee for a given year (n) shall be the total annual fee divided between all Tier 2 CCPs recognised on 31 December of the previous year (n-1) and multiplied by the applicable weight determined pursuant to Article 4 of this Regulation.

For the purposes of the first subparagraph, the total annual fee for a given year (n) shall be the estimate of expenditure relating to the tasks to be performed by ESMA with regard to all recognised Tier 2 CCPs under Regulation (EU) No 648/2012 as included in ESMA's budget for that year.

### *Article 3*

#### ***Annual fees in year of recognition***

1. For the year in which a third-country CCP is recognised by ESMA in accordance with Article 25 of Regulation (EU) No 648/2012, the annual fee shall be calculated as follows:

- (a) where ESMA recognises a CCP as a Tier 1 CCP, the annual fee shall be determined as the proportion of the basic recognition fee laid down in Article 1(1) of this Regulation calculated in accordance with the following ratio:

$$\frac{\text{Number of calendar days from the date of recognition until 31 December}}{\text{Number of calendar days in year}}$$

- (b) where ESMA recognises a CCP as a Tier 2 CCP, the annual fee shall be determined as the proportion of the additional recognition fee laid down in Article 1(2) of this Regulation calculated in accordance with the following ratio:

$$\frac{\text{Number of calendar days from the date of recognition until 31 December}}{\text{Number of calendar days in year}}$$

2. Where a CCP has paid an interim annual fee in accordance with Article 9 for the year in which that CCP is recognised as a Tier 1 CCP, the annual fee calculated in accordance with paragraph 1(a) shall not be charged.
3. Where a CCP has paid an interim annual fee in accordance with Article 9 or an annual fee in accordance with Article 2(2) for the year in which that CCP is recognised as a Tier 2 CCP, the amount of that fee shall be deducted from the fee to be paid in accordance with paragraph 1(b).

### *Article 4*

#### ***Applicable turnover for Tier 2 CCPs***

1. The relevant turnover of a Tier 2 CCP shall be its worldwide revenues accrued from provision of clearing services (membership fees and clearing fees net of transaction costs) during the CCP's most recent financial year.



Tier 2 CCPs shall provide ESMA, on an annual basis, with audited figures confirming its worldwide revenues accrued from the provision of the clearing services referred to in the first subparagraph. The audited figures shall be submitted to ESMA no later than 30 September each year. The documents containing audited figures shall be provided in a language custom to the financial services.

If the revenues referred to in the first subparagraph are reported in another currency than euro, ESMA shall convert them into euro using the average euro foreign exchange rate applicable to the period during which the revenues were recorded. For that purpose, the euro foreign exchange reference rate published by the European Central Bank shall be used.

2. On the basis of the turnover determined in accordance with paragraph 1 for a given year (n), the CCP shall be deemed to belong to one of the following groups:

- (a) Group 1: annual turnover below EUR 600 million;
- (b) Group 2: annual turnover of EUR 600 million or above.

A Tier 2 CCP in Group 1 shall be attributed the turnover weight 1.

A Tier 2 CCP in Group 2 shall be attributed the turnover weight 1,2.

3. The total turnover weight of all recognised Tier 2 CCPs for a given year (n) shall be the sum of the turnover weights determined in accordance with paragraph 2 of all Tier 2 CCPs recognised by ESMA on the 31 December of the previous year (n-1).
4. For the purpose of Article 2(3), the applicable weight of a Tier 2 CCP for a given year (n) shall be its turnover weight determined in accordance with paragraph 2 divided by the total turnover weight of all recognised Tier 2 CCPs determined in accordance with paragraph 3.

## CHAPTER II

### PAYMENT CONDITIONS

#### *Article 5*

##### ***General payment modalities***

1. All fees shall be paid in euro.
2. Any late payment shall incur the default interest laid down in Article 99 of Regulation (EU, Euratom) 2018/1046<sup>8</sup>.
3. Communications between ESMA and third-country CCPs shall take place by electronic means.

<sup>8</sup>

OJ L 193, 30.7.2018, p. 1.

## Article 6

### ***Payment of recognition fees***

1. The basic recognition fee provided for in Article 1(1) of this Regulation shall be paid when the CCP submits its application for recognition.

By way of derogation from the first subparagraph, where the Commission has not adopted an implementing act in accordance with Article 25(6) of Regulation (EU) No 648/2012 for the third country in which the CCP is established when the CCP applies for recognition, the basic recognition fee shall be paid at the latest on the day that such an implementing act enters into force.

2. The date by which the additional recognition fee provided for in Article 1(2) of this Regulation is to be paid shall be set in a debit note sent by ESMA to the CCP following ESMA's request to the CCP to submit additional information for the assessment of the CCP's compliance with the requirements laid down in Article 25(2b) of Regulation (EU) No 648/2012. The payment date shall provide the CCP with at least 30 days to pay, from the day on which ESMA sent the debit note to the CCP.
3. Recognition fees shall not be reimbursed.

## Article 7

### ***Payment of annual fees***

1. The annual fees provided for in Article 2 for a given year (n) shall be paid at the latest on 31 March of the year (n) to which they relate.

ESMA shall send debit notes to all recognised third-country CCPs specifying the amount of the annual fee at least 30 calendar days before the day when annual fees are to be paid.

2. The amount of the annual fee provided for in Article 3 in the year of recognition as well as the date by which the annual fee is to be paid, shall be stated in a debit note sent by ESMA to the CCP. The payment date shall provide the CCP with at least 30 days to pay, from the day on which ESMA sent the debit note to the CCP.
3. Annual fees paid by a CCP shall not be reimbursed.

## CHAPTER III

### **Transitional and Final Provisions**

## Article 8

### ***Applications for recognition already submitted***

1. Where a third-country CCP has submitted an application for recognition before [*PO, please insert the date of entry into force of this Regulation*], and ESMA has not yet adopted a decision to recognise or to refuse recognition of that CCP, the CCP shall

pay the recognition fee provided for in Article 1(1) by [*PO: Please enter the date that is 30 calendar days from the entry into force of this Regulation*].

2. By way of derogation from paragraph 1, where ESMA has suspended a third-country CCP's application for recognition before [*PO, please insert the date of entry into force of this Regulation*], the CCP shall pay the recognition fee provided for in Article 1(1) within the payment date stated in the debit note sent by ESMA to the CCP, following the notification that its application is no longer suspended. The payment date shall provide the CCP with at least 30 days to pay, from the day on which ESMA sent the debit note to the CCP.

#### *Article 9*

##### ***Interim annual fee for CCPs already recognised***

1. A third-country CCP that is recognised by ESMA in accordance with Article 25 of Regulation (EU) No 648/2012 at the time this Regulation enters into force shall pay an interim annual fee of EUR 50 000 for 2020 and each subsequent year until the review of its systemic importance pursuant to Article 89(3c) of Regulation (EU) No 648/2012 has been carried out and it has been recognised in accordance with either Article 25(2) or Article 25(2b) of that Regulation or such recognition has not been granted.
2. The interim annual fee for 2020 shall be paid within 30 days from the entry into force of this Regulation. Interim annual fees for another year (n) shall be paid at the latest on 31 March of the year (n) to which they relate.

#### *Article 10*

##### ***Entry into force***

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Commission*  
*The President*