

January 22, 2020

VIA ELECTRONIC SUBMISSION
European Securities and Markets Authority
201-203 Rue de Bercy
CS 80910
75589 Paris Cedex 12
France

Re: Consultation Paper on Procedural rules for penalties imposed on Third-Country CCPs, TRs and CRAs

To Whom It May Concern:

CCP12 appreciates the opportunity to comment on the European Securities and Markets Authority's ("ESMA") consultation paper on *Procedural rules for penalties imposed on Third-Country CCPs, TRs and CRAs* ("the Consultation Paper").¹

I. Introduction

CCP12 believes that embracing principles of international comity and an approach of mutual regulatory deference is of the utmost importance in adopting the supervisory powers that underpin EMIR 2.2. Approaches of regulatory deference rightfully allow local policy-makers to adopt and enforce legal and regulatory requirements that are appropriate for the markets they oversee, while facilitating cross-border cooperation and avoiding market fragmentation. A key piece of facilitating approaches of mutual regulatory deference is recognizing the expertise and primary role a home country regulator must play in supervising the central counterparties ("CCP") domiciled in its jurisdiction.

EMIR 2.2 revises the legal framework under which third-country CCPs ("TC-CCPs") are recognized in the EU and this framework provides ESMA the powers to impose fines and penalty payments on TC-CCPs. Successful approaches to mutual regulatory deference require that direct supervisory and enforcement authority over a CCP is undertaken by the CCP's home country regulator. However, these approaches are also built upon strong relationships between a CCP's home country regulator and host country regulators. Ultimately, approaches of mutual regulatory deference ensure that the CCP's home country regulator, who has the strongest interest in and expertise on the CCP, is the primary supervisor of the CCP. While we strongly believe such an approach should be followed by ESMA, at a minimum the TC-CCP's home country regulator should be directly consulted with in advance of the issuance of any potential fines or penalty payment by ESMA.

The proposed procedures for ESMA's fining and penalty payments under the Consultation Paper do not require consultation with a TC-CCP's home country regulator when imposing fines and/or penalty payments. Providing ESMA with the powers to unilaterally impose fines and penalty payments directly

¹ ESMA, Consultation Paper, Procedural rules for penalties imposed on Third-Country CCPs, TRs and CRAs (Dec. 2019), available at https://www.esma.europa.eu/sites/default/files/library/esma43-370-12_ta_cp_on_ccp_penalties.pdf.

on a TC-CCP, as the Consultation Paper proposes, conflicts with principles of international comity and the primary supervisory authority of the home country regulator. This could also negatively impact the efficiency of global financial markets. While a lack of consultation with the TC-CCP's home country regulator is concerning in any context, it is particularly concerning given fines and penalty payments can be substantial (e.g., 20 percent of annual turnover) and/or imposed without due process under the urgent action provision.

In addition to CCP12's broad concerns on ESMA's ability to impose fines and penalty payments on TC-CCPs, we have provided some more technical comments on the procedures proposed in the Consultation Paper below.

II. Responses to Specific Questions in the Consultation Paper

Q1. Do you agree with the proposal regarding the right to be heard and the procedure at the stage of the investigation conducted by the investigation officer? Please elaborate on the reasons for your answer.

Under Section 3 (Right to be heard by the investigation officer) of the Consultation Paper a person subject to an investigation has a right to provide a written submission in response to an investigating officer's statement of findings. Paragraph 33, however, seems to require that any asserted facts relevant to the person's defense must be supported by relevant documents. Whilst this aims to counter any possible reliance on "unsubstantiated allegations", it would not seem practicable to expect that all facts that are relevant to a defense will be substantiated by supporting documentation.

In addition, Paragraph 36 allows a person to make further submissions if a statement of finding is "materially" amended and where the person has not yet had an opportunity to comment. However, "materially" is not defined, nor who determines materiality.

It would also seem unreasonable to limit a person's ability to comment to just those situations where it has not yet had the opportunity to comment. A material or even minor change to the statement of facts might cause the person to want to amend its defense. A 'right to be heard' should provide the ability for a person to tailor their arguments in response to the other side's presentation as necessary and without limitation, especially given the fact that both the initial and amended statements would be included in the file for ESMA's review.

Q4. Do you agree with the proposal regarding the procedure before ESMA with regards to fines and supervisory measures, including the right to be heard? Please elaborate on the reasons for your answer.

Under Section 5 (Procedure before ESMA with regard to fines and supervisory measures, including the right to be heard) of the Consultation Paper, paragraph 48 makes clear that "it is not for ESMA to investigate the matter itself or direct the investigation of the investigation officer." This seems to contradict paragraph 50 which says that if ESMA disagrees with the findings of the investigation officer then ESMA must adopt its own statement of facts. This could only be achieved through an ESMA investigation and suggests a lack of independence of the investigation officer.

Q5. Do you agree with the proposal regarding the periodic penalty payments? Please elaborate on the reasons for your answer.

In Section 6 (Procedures with regard to periodic penalty payments) of the Consultation Paper, paragraph 58, it states “it is key that periodic penalty payments that would be imposed by ESMA, for example, during the investigation phase to compel a Tier 2 TC-CCP to submit to an investigation or an inspection...could be adopted by ESMA within a short timeframe.” Paragraph 59 makes clear that periodic penalty payments could be imposed on all recognized TC-CCPs and related third parties to whom recognized TC-CCPs have outsourced operational functions or activities. This implies that such enforcement could be applied to a non-regulated entity, e.g. cloud provider, or indeed a central bank at which the CCP holds an account which seems impractical and inappropriate.

Q7. Do you agree with the proposal regarding the adoption of interim decisions for TC-CCPs? Please elaborate on the reasons for your answer

CCP12 believes it’s important for the TC-CCP to have the opportunity to submit written comments to ESMA in both stages of this process (i.e. “Interim decision” and “Confirmatory decision”) and for ESMA to take them under consideration before any decision is made/ratified. As periodic penalties can be sanctioned until an interim decision is either confirmed or annulled, providing the right to the person subject to the investigation to provide comments will provide transparency and significantly increase the validity of both decisions’ phases.

Additionally, in particular, in the case of a fine and/or periodic penalty imposed under urgent action, such action should only be taken after direct consultation with the TC-CCP’s home country regulator, since due process has been suspended for the interim. Further, while consultation should occur regardless of the size of the amount of the fine and/or periodic penalty payment, failing to adopt a requirement for the TC-CCP’s home country regulator to be consulted could result in the unfortunate scenario where a TC-CCP has been effectively directed by ESMA to modify its practices in a manner that is inconsistent with the requirements of its home country regulator and then fined for failing to do so.

It would also be helpful to explicitly define that “significant and imminent damage” is solely in relation to the EU financial system.

III. Conclusion

ESMA’s procedures for imposing fines and penalty payments should at minimum, require consultation with the TC-CCP’s home country regulator.

IV. About CCP12

CCP12 is a global association of 37 members who operate more than 60 individual CCPs globally across Europe/Middle East/Africa (“EMEA”), the Americas, and the Asia-Pacific (“APAC”) regions. CCP12 aims to promote effective, practical and appropriate risk management and operational standards for CCPs to ensure the safety and efficiency of the financial markets it represents. CCP12 leads and assesses global regulatory and industry initiatives that concern CCPs to form consensus views of its members and seeks to actively engage with regulatory agencies and industry constituents through consultation responses, forum discussions and position papers.

V. CCP12 Members

