



European Securities and  
Markets Authority

# Consultation Paper

**Draft technical advice on commercial terms for providing clearing services under EMIR (FRANDT)**



## **Responding to this paper**

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex III. Comments are most helpful if they:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. describe any alternatives ESMA should consider.

ESMA will consider all comments received by 2 December 2019.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Your input - Consultations'.

### **Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

### **Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading '[Data protection](#)'.

### **Who should read this paper**

All interested stakeholders are invited to respond to this consultation. In particular, responses are sought from counterparties acting (or intending to act) as clearing service providers and counterparties that are current or potential clearing clients.

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# 1 Executive Summary

## Reasons for publication

The objective of this consultation paper is to seek stakeholders' feedback on the European Securities and Markets Authority's (ESMA) draft technical advice to the Commission on how to specify the conditions under which the commercial terms are to be considered to be fair, reasonable, non-discriminatory and transparent (FRANDT) when providing CCP clearing services to clients in accordance with Article 4(3a) of EMIR.

## Contents

This consultation paper covers the following sections: Section 3 provides information on the clearing incentives and identified issues with the access to clearing services. Section 4 discusses the cost of clearing. Section 5 describes the FRANDT principles. Section 6 presents ESMA's draft technical advice on how to specify the conditions under which the commercial terms are to be considered fair, reasonable, non-discriminatory and transparent, based on 4 criteria listed in subparagraph 3 of Article 4(3a) in EMIR. Section 7 contains the Annexes. The mandate to ESMA from the Commission (Annex I), the cost-benefit analysis (Annex II), the summary of questions for the consultation (Annex III) and the draft technical advice (Annex IV).

## Next Steps

ESMA will consider the feedback it receives to this consultation in Q4 2019 and expects to publish a final report and to submit the technical advice to the European Commission in Q1 2020.

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## 2 Introduction

1. On 20 May 2019, the European Parliament and the Council adopted Regulation (EU) 2019/834, EMIR Refit, amending Regulation (EU) 648/2012, EMIR, as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories. EMIR Refit was published in the Official Journal on 28 May 2019<sup>1</sup>.
2. EMIR requires a wide range of counterparties to clear OTC derivatives that are covered by the clearing obligation through CCPs<sup>2</sup>. To comply with this requirement, counterparties must become clearing members, clients, or must establish indirect clearing arrangements with clearing members, provided that those arrangements do not increase counterparty risk.
3. Given that only a few counterparties are clearing members of CCPs, most of the counterparties need to become clients of clearing members or establish indirect clearing arrangements to become an indirect client (i.e. a client of a client) in order to clear transactions via a CCP. This means that clients, direct or indirect, rely on the availability of client clearing services offered by clearing members or their clients to comply with EMIR's clearing obligation. Barriers to access central clearing such as a lack of available clearing services may cause market participants to cease transacting derivatives or to engage in non-cleared OTC derivatives trading, which would be contradictory to the efforts made to establish a sound and efficient cleared market and could lead to an increased risk in the financial markets.
4. In the process leading up to the proposal of EMIR Refit, one of the identified areas which could benefit from targeted action to ensure that the EMIR objectives were reached in a more proportionate, efficient and effective manner was access to central clearing, where in particular counterparties with a limited volume of activity in the OTC derivatives market experienced difficulties.
5. To address that lack of access to clearing and to facilitate access to clearing additional measures have been taken under EMIR Refit, such as clarifying that CCPs should not be prevented from following default management procedures by Member States' insolvency laws, introducing requirements on clearing members and clients offering clearing services and limiting the scope of the clearing obligation. Another important initiative to mitigate the barriers to access clearing services are the amendments under CRR in relation to the leverage ratio in relation to the client clearing.
6. The requirements on clearing members and clients, the clearing service providers, to offer and provide clearing services under commercial terms considered fair, reasonable, non-discriminatory and transparent (principles known as FRANDT) will be specified by the

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<sup>1</sup> OJ L 141, 28.5.2019, p.42. The text can be found following this link:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0834&from=EN>

<sup>2</sup> Article 4 of EMIR.

Commission in a delegated act pursuant to Article 4(3a) of EMIR in accordance with Article 82 of EMIR. The delegated act should be adopted well before the requirements start to apply on the 18 July 2021 in accordance with Article 2(c) of EMIR Refit.

7. Box 1: Recital 11 of EMIR Refit and Article 4(3a) of EMIR on the obligation on clearing service providers which provide clearing services, whether directly or indirectly, to provide those services under fair, reasonable, non-discriminatory and transparent commercial terms.

Recital (11) of EMIR Refit:

Counterparties that have a limited volume of activity in the OTC derivatives market face difficulties in accessing central clearing, whether as a client of a clearing member or through indirect clearing arrangements. Clearing members and clients of clearing members that provide clearing services, either directly to other counterparties or indirectly by allowing their own clients to provide those services to other counterparties, should therefore be required to do so under fair, reasonable, non-discriminatory and transparent commercial terms. While this requirement should not result in price regulation or an obligation to contract, clearing members and clients should be permitted to control the risks related to the clearing services offered, such as counterparty risks.

Article 4(3a) of EMIR:

3a. Without being obliged to contract, clearing members and clients which provide clearing services, whether directly or indirectly, shall provide those services under fair, reasonable, non-discriminatory and transparent commercial terms. Such clearing members and clients shall take all reasonable measures to identify, prevent, manage and monitor conflicts of interest, in particular between the trading unit and the clearing unit, that may adversely affect the fair, reasonable, non-discriminatory and transparent provision of clearing services. Such measures shall also be taken where trading and clearing services are provided by different legal entities belonging to the same group.

Clearing members and clients shall be permitted to control the risks related to the clearing services offered.

The Commission is empowered to adopt delegated acts in accordance with Article 82 to supplement this Regulation by specifying the conditions under which the commercial terms referred to in the first subparagraph of this paragraph are to be considered to be fair, reasonable, non-discriminatory and transparent, based on the following:

(a) fairness and transparency requirements with respect to fees, prices, discount policies and other general contractual terms and conditions regarding the price list, without prejudice to the confidentiality of contractual arrangements with individual counterparties;

(b) factors that constitute reasonable commercial terms to ensure unbiased and rational contractual arrangements;

(c) requirements that facilitate clearing services on a fair and non-discriminatory basis, having regard to related costs and risks, so that any differences in prices charged are proportionate to costs, risks and benefits; and

(d) risk control criteria for the clearing member or client related to the clearing services offered.

8. On 26 June 2019 the ESMA received a request from the Commission for technical advice on a possible delegated act concerning how to specify the conditions under which the commercial terms in relation to providing clearing services are considered to be fair, reasonable, non-discriminatory and transparent, pursuant to the third subparagraph of Article 4(3a) of EMIR.
9. The objective of this consultation paper is to seek stakeholders' feedback on ESMA's draft technical advice to the Commission on how to specify the conditions under Article 4(3a) of EMIR.
10. This consultation paper covers the following sections:
  - Section 3 covers clearing incentives and access to clearing services.
  - Section 4 relates to the cost of clearing.
  - Section 5 describes the FRANDT principles.
  - Section 6 presents ESMA's draft technical advice on how to specify the conditions under which the commercial terms are to be considered fair, reasonable, non-discriminatory and transparent, based on 4 criteria listed in under subparagraph 3 of Article 4(3a) in EMIR.
  - Section 7 contains the Annexes. The mandate to ESMA (Annex I), the cost-benefit analysis (Annex II), the summary of questions for the consultation (Annex III) and the draft technical advice (Annex IV).
11. For the purpose of this consultation paper, a clearing service provider refers to clearing members and clients (and their indirect clients) offering clearing services directly or indirectly and a clearing client refers to a counterparty using clearing services from a clearing service provider.
12. The FRANDT principles should apply to commercial terms for the provision of clearing services for over-the-counter derivative contracts pertaining to a class that has been declared subject to the clearing obligation under EMIR.

### 3 Clearing incentives and access to clearing services

13. The difficulties in accessing central clearing whether as client of a clearing member or through indirect clearing arrangements has been identified as a concern. The ESMA Final Report<sup>3</sup> on the clearing obligation for counterparties with a limited volume of activity presented an overview of the main difficulties faced by market participants in relation to accessing clearing services. Access to central clearing has also been carefully considered at an international level in different working groups<sup>4</sup>.
14. The insufficient access to clearing services and the lack of incentive to provide clearing services has had several possible reasons identified. One of the main hurdles identified were costs, especially the capital costs for providing clearing services in light of the leverage ratio framework under Basel III and CRR<sup>5</sup>.
15. By the time of the EMIR review the number of clearing members offering client clearing services and indirect clearing services did not seem to be sufficient. This results in a concentration of clearing services offered by few clearing members. This was identified as an area that needed further considerations and is reflected in the Impact Assessment, which concluded the following.

*“It seems that very few clearing members are currently offering client clearing services and indirect clearing services to financial counterparties and NFC+, or at least not to the smallest ones”<sup>6</sup>.*

16. EMIR Refit provides several different measures to facilitate access to clearing, including the following amendments:
  - The initial Refit proposal<sup>7</sup> from the Commission suggested new FRAND requirements, requiring clearing service providers to use not only "reasonable commercial terms" but to ensure that the commercial terms used are also fair and non-discriminatory. The Council and the Parliament included the aspect of transparency and hence the acronym was amended to FRANDT.
  - Member States' national insolvency laws should not prevent CCPs from following the default procedures in accordance with EMIR with regard to assets and positions held in omnibus and individual segregated client accounts held at the clearing member and at the CCP, and this protection also covers indirect clearing arrangements. Hence, Article 39<sup>8</sup> of EMIR was amended to provide that Members States' national insolvency laws should not prevent a CCP from acting in

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<sup>3</sup> [https://www.esma.europa.eu/sites/default/files/library/2016-1565\\_final\\_report\\_on\\_clearing\\_obligation.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-1565_final_report_on_clearing_obligation.pdf)

<sup>4</sup> <https://www.fsb.org/2018/11/incentives-to-centrally-clear-over-the-counter-otc-derivatives-2/>  
<https://www.fsb.org/wp-content/uploads/P191118-5.pdf>

<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD609.pdf>

<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD616.pdf>

<sup>5</sup> This has recently been addressed by the REGULATION (EU) 2019/876.

<sup>6</sup> P. 43.

<sup>7</sup> [https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-208\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-208_en)

<sup>8</sup> Referred to as segregation and portability.



accordance with the default procedures referred to in Article 48(5) to (7) of EMIR. This should further help CCPs in accepting clearing members and clients from different Member States, given that CCP default management rules can be applied with legal certainty.

- The lack of transparency and predictability of CCPs' initial margin requirements was also identified in relation to possible barriers to clearing services and this has been addressed by requiring the CCPs to provide their clearing members with a simulation tool allowing them to determine the amounts of initial margin that would be required by a new transaction and with details of its initial margin model (new Article 38(6) and (7) of EMIR).

17. The access to clearing was also considered under EMIR Refit by the amended clearing requirements for smaller counterparties. For NFCs the scope of the clearing obligation has been narrowed, and NFCs would only be subject to the clearing obligation for those classes of OTC derivatives for which they exceed the clearing threshold. For FCs the scope of the clearing obligation has also been narrowed by introducing a clearing threshold for FCs with a low volume of OTC derivatives activity. Only FCs above the clearing threshold would be subject to the clearing obligation. In addition, under EMIR Refit, ESMA is also tasked to periodically review the clearing thresholds and update them where necessary, in order to take account of any development in financial markets to ensure the thresholds remain relevant.

18. Another essential action to address the access to clearing is the recent developments under CRR which have clarified the position for margins provided in relation to the provision of clearing services: "A leverage ratio should also not undermine the provision of central clearing services by institutions to clients. Therefore, the initial margin on centrally cleared derivative transactions received by institutions from their clients and that they pass on to central counterparties (CCPs), should be excluded from the total exposure measure<sup>9</sup>". This will limit one significant disincentive for banks to offer clearing services and is envisaged to positively contribute to the access issue.

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<sup>9</sup> REGULATION (EU) 2019/876 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 OJ 7.6.2019, L 150/1 <https://eur-lex.europa.eu/legal-content/>

## 4 The cost of clearing

19. The requirements on clearing members to fulfil the membership criteria of the respective CCPs create substantial costs, including membership fee, contribution to the default fund (which takes into account the activity of the clearing member as well as the activity of its clients), technological requirements, maintenance of accounts or the cost of collateral management. Moreover, clearing members are often part of different CCPs simultaneously, allowing to clear clearing different products in different jurisdictions but increases the costs for the clearing members.
20. Clearing clients do not face these costs directly as they access the CCP indirectly via a clearing member, however such costs are wholly or partly (depending on the contractual agreement) passed on from clearing members to their clearing clients as part of the clearing arrangement, hence to clear a limited volume or number of transactions may translate into a costly service.
21. One way to increase the offer of clearing services, has been to offer the clearing services at a loss but engage in other services with such counterparty ("cross selling") to make the counterparty profitable on a total basis. This paper does not further consider bundling of services but notes the new requirements in relation to "conflicts of interest" in the offering of clearing services under Article 4(3a).
22. Providing clearing services entails several costs for the clearing service provider, for example to ensure its clearing clients comply with the requirements for the margining or collateral requirements (usually mirroring relevant requirements under EMIR) and to set up accounts for assets and positions and to monitor their positions. In the case of indirect clients, the clearing service provider will fulfil all obligations towards any up-stream intermediary counterparty in the clearing chain, including for example earmarking assets for default management procedures, and those processes are often complex and costly.
23. The total cost of clearing differs and depends on several factors including compliance with regulatory requirements and fees charged that could include on-boarding fees, license fees, fees per cleared transaction and/or volume and maturity, booking fees, maintenance fees, fees for different collateral services, fees per type of account, fees depending on notional amount or initial margin, etc.
24. ISDA estimated in 2016 that many clearing members are setting minimum annual revenues or clearing fees that range from around 90,000 EUR to 260,000 EUR<sup>10</sup>. The level of fees has a direct impact on cost for clearing clients and a fee structure with high fixed fees or generally high fees could make the central clearing economically challenging for clearing clients with a limited volume of cleared transactions and depending on the clearing clients financial resources, even not feasible. This may unintendedly exclude clearing clients which execute only very few trades per year from clearing services.

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<sup>10</sup> Key Trends in Clearing for Small Derivatives Users. ISDA Research Note. October 2016: <https://www.isda.org/a/rSiDE/key-trends-in-clearing-for-small-derivatives-users-final.pdf> Figures are in USD and have been converted by to euros by ESMA.

25. For this paper the fees are separated into four groups. The first set of fees are the onboarding fees, understood for the purpose of this paper as the fees charged by clearing service providers to onboard clearing clients and start providing clearing services. The second set of fees are the fix fees, understood for the purpose of this paper as the fees that are payable on an annual or other regular basis. The third set of fees are the fees in relation to transactions cleared, transactions fees where they are charged at transaction level. The fourth set of fees are the fees for additional services, such as post trade services including reporting, collateral management, reconciliation and compression services.
26. It is often more expensive to clear one transaction than to clear several transactions, as the fixed costs are spread over more transactions. Hence, one aspect to consider for fees is the volumes of trades to split the fixed costs over. Another aspect is the sophistication of the clearing services provided where a plain vanilla standardised service, i.e. less bespoke, probably is less expensive than both a very sophisticated service or a very bespoke process with, for example, manual processing, something that less sophisticated clearing clients may request where they clear a limited volume of transactions.
27. Prices for clearing services will differ primarily based on the volume, trading patterns, required collateral, level of standardisation and level of bespoke considerations, but introducing FRANDT in EMIR reinforces and requires with a higher level of granularity that all prices will have to be FRANDT compliant, i.e. prices should be fair, reasonable, non-discriminatory and transparent.

## 5 FRANDT

### 5.1 The aim of FRANDT

28. As mentioned, FRANDT requirements are part of a broader set of regulatory efforts for enhancing access to clearing and the effects of these measures are not yet known as they have recently entered or are about to enter into force and therefore market participants are still in the process of evaluating and implementing such changes. Whilst there are strong reasons to believe that the amendments to CRR and the change to the applicability to the leverage ratio, should materially increase the financial incentive to provide clearing services and in particular to counterparties with a limited volume of cleared transactions, this is to be confirmed. Another element to take into account is that the scope of counterparties that were facing the difficulties of accessing clearing services has decreased due to the amendments to the clearing obligation introduced by EMIR Refit, i.e. the exemption for small financial counterparties.
29. Access to clearing is complex and needs to balance, on the one hand, the contractual freedom of the clearing service providers and their clients and, on the other hand, the fundamental principles of FRANDT as stipulated in EMIR. The FRANDT requirement should not result in price regulation or an obligation to contract and clearing service providers should be permitted to control the risks related to the clearing services offered, such as counterparty risks. However, at the same time, where the clearing service providers do provide clearing services, whether directly or indirectly, they should offer and provide those services under fair, reasonable, non-discriminatory and transparent commercial terms.
30. Hence the implementation of the FRANDT requirements and how they are specified will have to take a balanced approach not to risk having a negative impact on any uptake in the offering of clearing services but at the same time ensure the FRANDT requirements result in a meaningful addition to the existing requirements for the provision of clearing services. Therefore, to specify the conditions under which the commercial terms for providing clearing services are to be considered to be fair, reasonable, non-discriminatory and transparent need to be carefully calibrated to achieve their main regulatory objective.
31. It may be noted, and as mentioned above, that EMIR (and other regulations) already stipulates requirements to comply with where clearing service providers offer and provide clearing services. The current legislation is not conflicting the aim of FRANDT, on the contrary, FRANDT builds on the existing references to reasonable commercial terms and the current requirements to publicly disclose information in relation to the services provided. FRANDT is providing further details on transparency and reasonable commercial terms to ensure the commercial terms are fair, reasonable, anti-discriminatory and transparent and therefore ensures that where clearing service providers do offer clearing services, this is done under FRANDT compliant commercial terms in a competitive and prudent risk-mitigating manner.

32. The ongoing compliance with the FRANDT requirements in the offering of clearing services is an ongoing obligation. Concepts such as reasonableness and fairness are not frozen in time and will change, what is 'reasonable' at one point in time may not be reasonable one year after. This is an aspect that clearing service providers will take into account to ensure that their terms for offering clearing services remain FRANDT compliant through the life of the contractual arrangement between the clearing service provider and its clearing client.
33. The effect of FRANDT will be evaluated and EMIR Refit requires ESMA to report to the Commission on the accessibility of clearing services, in particular whether the FRANDT requirements have been effective in facilitating access to clearing. This report is provided in preparation of the scheduled review<sup>11</sup> the Commission will undertake in five years (June 2023).

## 5.2 The use of FRAND(T) in EU law

34. According to the request to ESMA to provide a technical advice on a possible delegated act to specify the conditions under which the commercial terms for the provision of clearing services are to be considered FRANDT, the Commission invited ESMA to seek coherence within the existent provisions in the current regulatory framework of the Union. ESMA analysed the uses and application of FRAND or FRANDT principles<sup>12</sup> in different subject areas, from the overarching principles of competition in the Treaty on the Functioning of the European Union (TFEU)<sup>13</sup> and its application within the area of patents to also be included in several financial regulations to ensure a prudent offering of certain services in the financial market. The uses of FRANDT principles in financial markets are diverse and were considered in the preparation of this advice although these FRANDT applications did not seem to be particularly well suited or directly relevant in relation to the provision of clearing services<sup>14</sup>.

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<sup>11</sup> Article 85(1) and (2) of EMIR.

<sup>12</sup> The difference between FRAND and FRANDT is that 'Transparent' has been added to the Fair, Reasonable, Non-Discriminatory principles.

<sup>13</sup> Articles 101 and 102 of the Consolidated version of the Treaty on the Functioning of the European Union <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT>

<sup>14</sup> There are provisions related to FRANDT principles in MiFIR (Recital 40 and Article 37) on non-discriminatory access to and obligation to licence benchmarks; in MiFID II (Article 47) on organisational requirements for orderly trading; in the Benchmarks regulation (Article 22) on access to benchmarks; in EMIR (Articles 7, 8 and 38) on access to a CCP or to a Trading Venue and (Recital 42) on access to information held in trade repositories.

## 6 Specifying the conditions for FRANDT compliant commercial terms

### 6.1 Requirements for FRANDT commercial terms - fairness and transparency - Principle 1

35. Article 4(3a)(a) of EMIR provides the criteria to consider in establishing a set of conditions to ensure clearing services are provided on commercial terms in compliance with FRANDT principles. The first aspect is fairness, in respect to fees and other costs and in relation to other general contractual terms and conditions. The other aspect is the transparency of such fees and other costs and in relation to other general contractual terms providing conditions for such price list. The remit of such transparency is to respect the boundaries of confidentiality of contractual arrangements between individual counterparties.

[...] by specifying the conditions under which the commercial terms [...] are to be considered to be fair, reasonable, non-discriminatory and transparent, based on the following

(a) fairness and transparency requirements with respect to fees, prices, discount policies and other general contractual terms and conditions regarding the price list, without prejudice to the confidentiality of contractual arrangements with individual counterparties;

36. The introduction of FRANDT principles in EMIR Refit builds on the already existing EMIR framework for transparency.

37. EMIR already (before the Refit amendment) requires clearing members to publicly disclose the prices and fees associated with the services provided, with granularity on prices and fees of each service provided separately (including discounts and rebates and the conditions to benefit from those reductions). The regulation also requires a clearing member to publicly disclose the levels of protection and the costs associated with the different levels of segregation, and the clearing member has to offer those services on reasonable commercial terms. The requirements on clearing service providers when providing indirect clearing services, further stipulates in the Commission Delegated Regulation 149/2013 on the clearing obligation and indirect clearing, for example, to provide clearing services on reasonable commercial terms and publicly disclosing the general terms and conditions under which services are provided.

38. Fairness represents equal treatment of cases with similar circumstances. Hence similar clearing services should be subject to the similar costs. Transparency is therefore a cornerstone in the implementation of the new FRANDT requirement. To provide the clearing client with all relevant information to assess its costs of using different clearing services is crucial to ensure FRANDT assessments and compliance. Whilst the prices and fees are publicly disclosed today, as per the EMIR requirements, the presentation and comparability of the information has been noted as one area of improvement. To ensure

FRANDT compliant commercial terms it is of utmost importance to ensure the prices are publicly disclosed in a clear and precise manner that makes them easily readable, understandable and comparable. A higher degree of harmonisation of information disclosed would enhance transparency and would make prices comparable across different services and clearing service providers in an efficient manner. This would also aim to ensure the commercial terms are fair because they are easily accessible and comparable to the clearing clients wishing to either start clearing or undertake additional services with a clearing service provider.

39. Ensuring the commercial terms for providing clearing services are FRANDT compliant will give clearing clients greater confidence in these terms. This may increase market confidence in the access to clearing and encourage more clearing clients not to avoid transactions subject to the clearing obligation and hopefully increase clearing, where economically justified. However, the level of transparency raises several aspects to bear in mind:

- To find the right balance between the need to provide sufficient guidance for clearing clients for them to be able to assess the pricing structures easily between different clearing service providers and respecting the right for the clearing service providers to determine a pricing structure suitable to their business model.
- To respect the boundaries of confidentiality of contractual arrangements between individual counterparties.
- Not to require too much information or harmonisation where such requirements could be challenged as disproportionate and too burdensome for the clearing service provider, however the obligation to publicly disclose the general terms and conditions under which it provides those services is already in EMIR.

40. ESMA considers that the delegated act could specify the conditions regarding fair and transparent commercial terms in relation to fees, prices and general contractual terms by introducing certain requirements when the clearing service provider publicly discloses fees, prices, rebates and general contractual terms in order for the clearing clients to be in a position to exhaustively and clearly compare different offerings of clearing services.

41. **Scope of services offered:** The scope of the clearing services should be clearly specified, detailing the financial instruments for which the clearing service provider is offering clearing services and to the extent additional services are offered including reporting, collateral management and compression. The financial instruments should follow the naming convention for asset classes and contract types as in the financial instruments in the Delegated Regulation (EU) 148/2013 as amended by Delegated Regulation (EU) 2017/104 and Commission Implementing Regulation (EU) 1247/2012.

42. *Considerations:* This requirement should not be burdensome as classifications of derivatives are well established and used in the market and no additional systems or IT would be needed but it would ensure a solid base for the harmonisation of transparency in the provision of clearing services.



43. **Publicly disclosing general contractual terms:** The standard contract under which the clearing service provider offers clearing services should be publicly disclosed. It should be made available on a freely accessible (no subscription) website of the clearing service provider. The contract should be clearly divided into sections to ensure a clearing client may be able to compare the different contracts. The sections could include the scope, definitions, netting, provision of indirect services, information, relationship with indirect clients, indemnity. The standard contract would include a separate schedule or annex for amendments, justifications or elections. The requirement to disclose publicly the contract terms should not amount to publishing bilateral agreed contract terms subject to confidentiality.
44. *Considerations:* This requirement is based on the current requirement to publicly disclose the general terms and conditions of its services and is aiming to improve the visibility of the published terms and conditions. The market is today using standardised terms and conditions in the offering of clearing services and the use of standardised terms is increasing visibility for clearing clients as the base in comparing different offers will be limited to the additions, amendments and adjustments suggested by the clearing service provider to the clearing client. This requirement should not be too burdensome as it is merely codifying the practice of the market.
45. **Fees disclosure:** Fees vary depending on several factors, the main ones being the specific risk profile and the application of the risk control criteria for each clearing client but also some other elements can have an impact on the fees, such as the trading strategy, the products or the volumes to be cleared. In order to ensure transparency and a fair process for determining the applicable fees, clearing service providers should disclose a pre-defined set of their client clearing categories resulting from the internal models of risk assessment used to rate their prospective clients based on their credit risk and risk control criteria (client clearing categorisation). The fees listed below should be disclosed separated by each client clearing category in a manner that allows clearing clients, once they know the category the clearing service provider assigns to them, to understand the different standard fees that would apply to them.
46. Clearing service providers should publicly disclose the prices and fees associated with the services provided (including the prices and fees of each service and discounts and rebates and the conditions to benefit from those reductions). In order to publicly disclose the fees, prices and discount policies in a fair and transparent manner, the price lists should be standardised, easy to read and complete, i.e. cover the total cost of the clearing services offered. It should distinguish between on-boarding fees, fixed fees, transaction fees and any other fees related to any additional services offered.
47. The **on-boarding fees**, where applicable, represent a one-off cost for the clearing client at the beginning of the relationship that can cover, for instance, the fee to plug the clearing client into the required IT infrastructure of the clearing service provider, registration costs, costs of negotiating and agreeing on the relevant documentation, etc. The on-boarding fees should be publicly disclosed on the website of clearing service providers, it should be structured and easily accessible. Where a clearing service provider does not apply on-boarding fees but where such fees are included under the fixed fees, such as the minimum



fees, the clearing service provider should clearly disclose which part of the fixed fees are related to the fees for onboarding and how they are calculated.

48. Clearing has further inherent high costs that are **fixed** for a clearing member, such as the clearing member fee, the contribution to the CCP default fund and the operational infrastructure and staff needed. These fixed costs are usually passed on to the clearing clients who do not have to bear them directly as they will access the CCP only indirectly. Whilst the actual cost a clearing service provider has is not subject to disclosure, the fixed fees the clearing member charges for its services is subject to being publicly disclosed. Such fixed fees should be presented and clearly divided based on the client clearing categorisation into different areas, including for example IT costs, annual fixed fees, annual licencing fees, fees for different types of accounts (e.g. monthly price per Omnibus Segregated Account (OSA) or per Individual Segregated Account (ISA), Gross Omnibus indirect clearing Account (GOSA)) and fees for collateral management. Each area should clearly stipulate the type of costs that has been included under the fee.
49. Any standard **fee per transaction**, where applicable, should be publicly disclosed and where the prices per transaction reflect risk assessments in relation to the clearing client, the pre-disclosed pricelist should differentiate between prices based on the client clearing categorisation. The prices at transaction level should be presented (where applied) by asset class and specifying the standard fee to, for example, clear one transaction (or 20 transactions, 50 transactions, 100 transactions, 500 transactions or 1000 transactions), in relation to volumes or in relation to the collection of collateral and management of collateral posted by clearing clients.
50. Other **fees in relation to additional services** required for the provision of the clearing services should be publicly disclosed separately for each additional service provided, such as fees for collateral transformation and fees in relation to post trade services, for example, reporting and compression services should be publicly disclosed. Any additional required top-up fees should also be publicly disclosed.
51. The clearing service provider may apply discounts and rebates, where the conditions to benefit from those reductions are pre-disclosed publicly. Any discount or rebate should be compliant with FRANDT, i.e. fair, reasonable, non-discriminatory and transparent. To base any discount or rebate on fair and reasonable objective criteria such as volume would assist the clearing clients to understand how rebates are calculated and would ensure an equal application of such discounts and rebates<sup>15</sup>. Different pricing schemes should be equally applied among clearing clients. Any discounts and rebates should be carefully designed not to create unbalanced pricing structures, for example with discounts only advantaging very large clearing clients with large volumes cleared.
52. The requirement to disclose publicly all fees and possible discounts and rebates does not amount to publishing bilateral agreed contract terms. However, to ensure the transparency of fees and reductions is efficient, the clearing service provider should publicly disclose on

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<sup>15</sup> and risk (e.g. a counterparty with a large volume of transactions and a highly risky profile might not benefit from the same fee decrease as another with same volume and a more conservative risk profile).

a yearly basis the range of actual fees charged per class of instrument and per client clearing category.

53. *Considerations:* This requirement is based on the current requirement to publicly disclose the prices and fees associated with the services provided (including the prices and fees of each service, including discounts and rebates and the conditions to benefit from those reductions). This requirement should not be burdensome as it is codifying the practice of the market, it however introduces further requirements on transparency through disclosure. In addition, provides further granularity on the fees disclosed and some requirements and considerations for discount policies and rebates applied.

**Q. 1: Do you generally agree with the approach on transparency and how to publicly disclose fees and commercial terms and other conditions? Please elaborate and if you disagree with any specific requirement, please suggest alternative ones. You can also suggest additional ones.**

## **6.2 Requirements for FRANDT commercial terms - unbiased and rational contractual arrangements - Principle 2**

54. Article 4(3a)(b) of EMIR provides criteria to consider in establishing a set of conditions to ensure clearing services are provided on commercial terms that are compliant with FRANDT. The aim of this criteria is to ensure the terms under which clearing services are offered constitute reasonable commercial terms that ensure unbiased and rational contractual arrangements.

[...] by specifying the conditions under which the commercial terms [...] are to be considered to be fair, reasonable, non-discriminatory and transparent, based on the following

(b) factors that constitute reasonable commercial terms to ensure unbiased and rational contractual arrangements;

55. EMIR already contains the requirement for clearing services to be offered on reasonable commercial terms. This requirement is though not further specified and therefore it may be difficult to assess the reasonableness of a specific contract term or if fees are reasonable. Increasing visibility of the commercial terms may assist in the assessment made by clearing clients in the process of accessing clearing services and considering enter into a transaction cleared through a certain clearing service provider.
56. The new requirement under FRANDT provides further clarification as to the concept of reasonable commercial terms and stipulates that to ensure reasonable commercial terms they need to be unbiased and rational to prevent clearing service providers offering clearing services on terms that are unfair. The terms of the provision of clearing services should be applied equally to the counterparties with similar characteristics (e.g. risk profile, volume, type, size).

57. The contractual terms include a wide range of terms and conditions such as the duration of clearing services, contract termination, indemnification and limitations of liability and a wide range of fees. To ensure the commercial terms are reasonable requires knowledge about the contract terms and hence, the disclosure of fees and contract terms in accordance with principle (a) is therefore a fundamental value to ensure rational commercial terms.
58. Whilst stipulating the requirements for commercial terms to be reasonable one has to bear in mind the underlying contractual freedom, that FRANDT does not create a price regulation, that clearing service providers should be permitted to control the risks related to the clearing services offered, such as counterparty risks.
59. All clearing clients should be treated equally according to their categorisation and all contracts should be on arm's length terms, understood as a relationship between two parties who are unrelated or strangers and therefore each owes no special obligation or privilege to the other party. This approach would set the grounds for unbiased and rational contractual terms.
60. In order to provide clearing services on reasonable commercial terms, the clearing service provider should comply with at least the principles set out below to specifying the conditions under which the commercial terms should be assessed to be fair, unbiased and reasonable.
61. **Technology requirements:** The provision of clearing services entails a considerable number of technological requirements and to apply the requirement of "reasonable commercial terms" may not provide enough clarity to the clearing service providers of the type of considerations to make when requiring certain technological requirements. Consistently with the existing requirements under EMIR, by which a CCP is mandated to publicly disclose the operational and technical specifications requested from clearing members, the operational and technological requirements requested by clearing service providers from clearing clients to access and use clearing services are equally relevant and should also be made public.
62. The starting point is that technological requirements should not, where possible, represent a barrier to access clearing or result in biased and irrational contractual terms nor should the technology requirements result in clearing service providers using technology requirements to be selective in the provision of clearing services where such requirements are not linked to risk or other justified business requirements.
63. Hence, the level of technological requirements should be justified in relation to the services requested, applied equally and in a proportionate manner. There should be possibilities to have less advanced processes for accessing a clearing service provider where a simple service is required. However, the use of manual processes may though incur a higher cost, proportionate to the additional work and the additional risks (e.g. processing errors in the absence of straight through processing systems) by the clearing service provider. Any technology requirements for additional services should be separately offered and clearly separated from the offering of the clearing service to ensure the technology requirements

for the clearing services are separated from technology requirements for any additional services. It would be welcomed if clearing service providers could differentiate the technology requirements for different services provided, to offer where possible "plain vanilla" clearing services with a more simplified technological requirements to simplify access to clearing and ensure the technological requirements are reasonable compared to the services offered.

64. *Considerations:* Technology is a main cost driver for any service in relation to the different solutions offered in the market. Clearing service providers should be careful in their technology requirements for accessing their clearing services to ensure they are not considered as unreasonable considering the services requested and provided. The requirement to disclose operational and technological specifications is based on existing requirements applying to CCPs in their relationship with clearing members. Hence, this requirement should not be too burdensome but would bring value to clearing clients assessing different clearing service providers offers of clearing services in relation to their technical requirements and the capabilities of the clearing client to meet those requirements.
65. **Standardised Commercial Terms:** The agreements for providing clearing services shall be publicly available in the form of a standard set of documents to ensure legal review is effective, reasonable and non-discriminatory. The clearing service provider should use standardised contract terms for the provision of clearing services, where possible, to simplify the review process for clearing clients and to ensure similar contract terms applies to all its clearing clients. The commercial terms documenting the relationship should be clearly drafted, complete and concise and where several documents are part of the provision of the clearing service, a clear structure of the hierarchy of documents should be provided. The commercial terms should not include unnecessary duplicative terms and the contract should not include local law requirements only as references to the local law but should replicate its content.
66. Contractual requirements should be in line with the relevant EMIR requirements, for example where a clearing service provider has to comply with certain requirements, such requirements may translate into requirements for the clearing client. However, where such requirements are not derived from EMIR or other regulatory requirements, such terms would need to be objectively justified to be considered commercial terms compliant with the FRANDT principles.
67. To ensure the clearing service provider may undertake its risk assessments and manage identified risk and other business considerations, the standard contract may contain a schedule or sections where all amendments, additions or elections to the standard terms are included for the parties to tailor the contract terms to reflect the business requirements.
68. One aspect to note in the assessment of whether the published terms are to be considered fair and reasonable, is the negotiating balance for both parties, at the outset, where the standardised terms are established and in relation to any amendments made to such standard terms. The contractual terms under which the clearing services are provided should be FRANDT compliant and the fact that standardised terms are considered

standard does not by itself make them FRANDT compliant. In addition, a clearing client should be able to request an explanation in relation to the contract terms and any amendment suggested by the clearing service provider in order to consider and understand the reason for the proposed contractual clause.

69. The contract terms should avoid any provisions requiring a clearing client (where such clearing client is also acting as a clearing service provider) to disclose any confidential or sensitive business information to the clearing service provider unless required under EMIR or any other applicable regulation and the details of any indirect clearing client should remain anonymised. The clearing service provider should also ensure to monitor compliance with the contract terms (or any other requirements) in the same manner for all clearing clients and should enforce those terms and restrictions in a fair, rational, unbiased and non-discriminatory manner.
70. *Considerations:* The market is today using standardised terms and conditions based on the standard terms developed by different market associations but modified to reflect the business requirements of the clearing service provider in the offering of clearing services. The use of standardised terms increases visibility for clearing clients. As this requirement is based on the current practice of using the industry standard documents this requirement should not be too burdensome as it is merely codifying the practice of the market.
71. **Changes to the commercial terms:** Any change to the terms and conditions for the provision of clearing services agreed between the clearing service provider and the clearing client should be consistent with the general principle which states that all commercial terms should be reasonable. The practice of ensuring the terms of the clearing services are reasonable could benefit from further specifications as to what is reasonable commercial terms in relation to the FRANDT principles. For example, where clauses that allow for unilateral changes of terms are agreed within the contract, this may be considered biased and irrational, for example where not applied equally to all clearing clients. This situation could even force the clearing client to end the clearing relationship with the clearing service provider where such requirements are too costly or burdensome for the clearing client to adopt to or technically challenging to implement. Hence, all proposed changes should be reasonable, justified and applied equally (to the extent possible) to all counterparties in a non-discriminatory manner. Unilateral changes or actions are though not conflicting with FRAND where they derive from regulatory requirements or CCP rules or where a part exercise its termination rights under the agreement.
72. Similarly, any material or unexpected change in the risk models applied by the clearing service provider could translate into a disproportionate cost or even, again, an early termination for the clearing clients. For that reason, the models as applied at the time of onboarding should remain applicable and any changes to the models applied by the clearing service provider with a material impact on clearing clients should be communicated well in advance with the justification for it. Again, with the exception where a change to the contractual terms derives from the application of applicable law or the rules of the CCP.

73. *Considerations:* The foundation of any contract is contractual freedom, however the requirement for the commercial terms to be reasonable, fair, unbiased and rational provides a limitation to the contractual freedom and provides certain requirements on the terms under which the contract for clearing services are provided. This requirement should not amount to burdensome requirements on the clearing service providers as already today the commercial terms should be reasonable and inserting requirements to amend the contract terms unilaterally, unless justified by adopting to regulatory requirements or required due to mandatory changes to the terms the CCP (for example rule book) under which the CCP is providing its clearing services to the clearing member, would be difficult to justify as reasonable.

74. **Termination and replacement:** Another aspect to the contract terms are the termination provisions and the possibilities to find a replacement clearing service within a certain required timeframe. This aspect is specific to the clearing business and there are two considerations, the clearing service providers are for now limited and there is an underlying obligation by law to clear certain contracts. It has been raised as a consideration in relation to access to clearing services that some clearing clients, particularly clearing clients with a limited volume of clearing, may struggle to find a replacement clearing service provider in the case of a termination of the contract by the clearing service provider. To mitigate any unjustified difficulties by the clearing client the notice period should not be unreasonable short and should (where possible) provide sufficient time to facilitate the set-up of a new clearing arrangements with another clearing service provider. The contracts should mitigate to the extent possible any cliff-edge effect in a termination scenario and accommodate for time to resolve a breach (where possible) and if not, provide reasonable time to find a replacement clearing service provider. Hence, the notice period should be at least 6 months where for example the termination is due to new regulatory requirements, relocation of clearing services or changes to the clearing services offered such as changes the product range of services provided, implementing new technology requirements or changes the collateral management process as part of its business consideration for its services. The termination period may be shorter where the termination is in relation to specific causes for example in relation to pre-agreed termination provisions, default, illegality or force majeure, but the reasons for a shorter termination period should be reasonable and objectively justified.

75. *Considerations:* The requirement to ensure a clearing client has the time to identify and onboard with a new clearing service provider may not be an established practice but an important aspect of access to clearing services as the providers of such services are limited, the process to on-board to a new clearing service provider is time consuming, costly and cumbersome and acknowledging the underlying legal obligation to clear certain transactions. Due to the importance of this requirement it is justified to provide further requirement for the clearing service provider to comply with under FRANDT and it should not be burdensome for the clearing service provider to provide sufficient time for the clearing client to replace its service provider.

**Q. 2: Do you generally agree with the elements to be taken into consideration in the commercial terms for the provision of clearing services? Please elaborate and if you**



disagree with any specific element, please suggest alternative ones. You can also suggest additional ones.

### 6.3 Requirements for FRANDT commercial terms –facilitate clearing services, prices to be fair and non-discriminatory - Principle 3

76. Article 4(3a)(c) of EMIR provides the elements to consider in establishing a set of conditions to ensure clearing services are provided on commercial terms being compliant with FRANDT principles. The aim of this criteria is to provide requirements that facilitate clearing services on a fair and non-discriminatory basis, having regard to related costs and risks, so that any differences in prices charged are proportionate to costs, risks and benefits.

[...] by specifying the conditions under which the commercial terms [...] are to be considered to be fair, reasonable, non-discriminatory and transparent, based on the following

(c) requirements that facilitate clearing services on a fair and non-discriminatory basis, having regard to related costs and risks, so that any differences in prices charged are proportionate to costs, risks and benefits;

77. EMIR provides requirements on the commercial terms being reasonable however the introduction of FRANDT principles by EMIR Refit provides further requirements for the commercial terms to be fair, non-discriminatory and facilitate clearing services. The commercial terms should also ensure that any differences in prices charged are proportionate to costs, risks and benefits.

78. This section has to be considered in combination with Section 5.1 on the aim and limits of applying FRANDT principles and Section 6.2 of this paper, on the principles for fair fees. The transparency of the commercial terms including fees for the provision of clearing services are described under principle 1 (6.1) and is not further discussed here.

79. To facilitate access to clearing services, the first consideration is the on-boarding process for new clearing clients and how the terms for the onboarding is presented. The onboarding process has been raised as an area for improvement as identified by some market participants as disproportionately complex, uncommitted and time-consuming, in particular for counterparties with a limited volume of cleared transactions. The onboarding process contains several aspects for the clearing clients to consider, including the category in which the clearing service provider classifies the clearing client according to the client's risk profile (which will determine the amount of the fees to be paid), the scope of services offered, the contractual terms offered, the margin models to implement and the technical requirements to adopt. The requirements to be met by clearing clients could include: regulatory requirements (e.g. the need to be a regulated financial counterparty or certain capital requirements); IT requirements (e.g. certain interfaces, automated back office systems); HR requirements (e.g. the need to employ certified clearing specialists that fulfil the

knowledge requirements of the CCP and are, therefore, permitted to operate clearing systems); availability requirements (e.g. the need to be available for intraday margin calls during a certain period of time at each clearing day); collateral requirements; documentation requirements; reporting requirements and compliance requirements.

80. Due to the complexity of this process the requirement for the commercial terms to be reasonable may not be sufficient to ensure a manageable and not too burdensome onboarding process for a clearing client. The process of accessing clearing services should therefore be facilitated, for example by giving counterparties greater visibility on the onboarding process. The clearing service provider should therefore ensure that at least the following requirements are met when providing clearing services to comply with the FRANDT requirements in relation to the onboarding process.
81. **Onboarding process:** In addition to the requirement to ensure the transparency of the commercial terms and fees as further described under section 6.1 and 6.2, the onboarding process should be transparent. The clearing service provider should ensure that they have a clearly marked, easy accessible and complete webpage dedicated to the onboarding process containing for example a description of the process for onboarding, action lists, the document set relevant for different services, fee list setting out the fees for the different services possibly provided separated by client clearing categories and estimations of the time from application to the clearing client is "onboarded". To comply with the requirement to facilitate clearing services based on reasonable, fair and non-discriminatory terms, the on-boarding process should avoid unjustified and unproportionate onboarding requirements and challenging delivery times that could be seen as unreasonable or even discriminatory for counterparties seeking to onboard as clearing clients where such requirements do not derive from a requirement in a regulation and should at the same time facilitate to the extent possible procedural steps (allowing for example the use of electronic signatures where possible).
82. Likewise, any operational or technological pre-conditions for on-boarding that are required by the clearing service provider should be reasonable, fair and non-discriminatory. Therefore, in order to facilitate access to clearing services, these requirements should avoid (to the extent possible) the use of technology systems not available to such clearing clients (for example, based on licencing restrictions) and technology requirements that are disproportionate and too cumbersome to comply with for a clearing client with limited volumes of cleared OTC derivatives. The aim would be a transparent and standardised process with pre-disclosed requirements, fees and the standard contractual terms the clearing service provider applies where providing clearing services (i.e. before they are adjusted to reflect the clearing client applying for the service). Such predefined process would simplify the process for clearing clients and at the same time increase trust and efficiency in the process, which in turn should result in facilitating access to clearing.
83. *Considerations:* The on-boarding process may benefit from further clarifications as to how to ensure it is reasonable and creates reasonable commercial terms that complies with the FRANDT requirements. These requirements should not be too burdensome for the clearing service providers as the purpose of further requirements is to ensure transparency, visibility





and to achieve commercial reasonable terms for the clearing services provided and this is already a requirement today.

**84. Proportionate prices and fees:** This principle also contains the requirement that any differences in prices charged are proportionate to costs, risks and benefits. This derives from the commercial terms being reasonable and hence should reflect the costs, risk and benefits, however under the FRANDT requirements, the clearing service provider is required to clearly justify that any differences in fees are in relation to the listed factors such as costs, risks and benefits and this is a new requirement under EMIR. The use of the client clearing categorisation would assist in assessing the proportionality and provide transparency as all clearing clients of the clearing service provider should be categorised based on published factors that constitute the risk criteria and ensure all fees are based on such categorisation of the clearing client. In this manner, it will be possible to assess proportionality of fees after the clearing service provider has determined the client's clearing category.

85. To assess the proportionality of fees, the clearing service provider should present the costs assumed by the clearing service provider in providing those services. Whilst the clearing service provider has the right to have at least its costs for providing clearing services covered, this is different from applying costs that could arguably be unreasonable and not reflective of the costs faced to provide the clearing service.

86. *Considerations:* To ensure the commercial terms are FRANDT compliant the clearing service providers shall justify that any differences in fees are in relation to identified factors such as costs, risks and benefits as part of the client clearing categorisation. However, the EMIR framework before Refit already stipulates clearing services should be offered on reasonable commercially terms and clearing service providers already today classify their clearing clients based on risk and other business considerations, although they may not fully disclose their internal assessments for the classification of clearing clients today.

**Q. 3: Do you generally agree with the suggestions to assist in facilitating access to clearing services? Do you generally agree with the requirements listed to ensure prices are fair, proportionate and non-discriminatory? Please elaborate and if you disagree with any specific element, please suggest alternative ones. You can also suggest additional ones.**

## **6.4 Requirements for FRANDT commercial terms – risk control criteria - Principle 4**

87. Article 4(3a)(d) of EMIR provides the final criteria to consider in establishing a set of conditions to ensure clearing services are provided on FRANDT terms. The aim of this criteria is to ensure that the risk assessment is relevant and justified, however bearing in mind that EMIR permit clearing service providers to control the risks related to the clearing services offered, such as counterparty risks and that there is no obligation for clearing service providers to provide clearing services.

[...] by specifying the conditions under which the commercial terms [...] are to be considered to be fair, reasonable, non-discriminatory and transparent, based on the following

(d) risk control criteria for the clearing member or client related to the clearing services offered.

88. The FRANDT requirement stipulates that the clearing service providers may consider risks, hence clearing service providers may refuse to provide clearing services on grounds of risk including not limited to counterparty risk.
89. MiFID II and the corresponding RTS<sup>16</sup>, contains a listed set of requirements a clearing firm has to take into account in its initial assessment of a prospective clearing client, including the following criteria; credit strength, internal risk control systems, intended trading strategy, payment systems and arrangements to ensure a timely transfer of assets or cash as margin, systems settings to respect any maximum trading limit agreed, any collateral provided, operational resources, any involvement of the prospective clearing client in a breach of the rules ensuring the integrity of the financial markets, including involvement in market abuse, financial crime or money laundering activities.
90. Where a clearing service provider shall decide to offer clearing services to an applicant clearing client, it shall undertake its assessment of such prospective clearing client respecting the following FRANDT based principles whilst taking into account the nature, scale and complexity of the prospective clearing client's business and considering risk related aspects.
91. **Risk elements:** The risks that a clearing service provider may assess includes counterparty risk but is not further specified under FRANDT. The risks considered and the risk assessment applied shall be relevant, proportionate and justified. It may well be that some risks assessments are less relevant for certain provision of services than for others. The risk criteria should be assessed objectively at the time of on-boarding and on an on-going basis for all clearing clients to which clearing services are offered and should be reasonable and non-discriminatory. The risk criteria may include the following:
- Risk assessments
  - Legal assessments
  - Credit assessments
92. *Considerations:* The risk aspects are already applied by clearing service providers and the requirement to use well defined risk criteria should be merely a codifying of practices.

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<sup>16</sup> Article 17(6) of Directive 2014/65/EU and Article 25 of the RTS (6).

93. **Client Clearing categorisation:** The risk control criteria considered for determining the onboarding of a clearing client should be pre-defined and publicly disclosed to ensure transparency and visibility to any prospective clearing client as to the assessment to be made by the clearing service provider. The clearing service provider should therefore publicly disclose the risk control criteria it uses to classify its clearing clients. The different categories are to be determined by each clearing service provider and the different categories should explain the components used for the assessments of the risk control criteria and provide the justifications of the risk factors taken into account and for which purpose, when classifying a given type of clearing clients under the client clearing categorisation methodology. The assessment will take into account the credit risk profile including e.g. considering the risk factors such as the state of its balance sheet, liabilities, assets, expected cash flows.
94. The outcome of the credit service providers client clearing categorisation should be completed as part of the onboarding process and will determine the fees for the clearing client using the clearing services. Any change of category after the on-boarding process has finalised needs to be justified accordingly with changes in the risk profile of the client and providing the reasoning for such re-classification.
95. *Considerations:* This requirement should not be too burdensome as it is merely codifying the practice of the market to conduct risk assessments, but it provides further requirements on the clearing service provider to establish a client clearing categorisation to ensure comparability of fees and to publicly disclose the factors being assessed in relation to the categorisation.
- Q. 4: Do you generally agree with the proposed elements regarding the risk control criteria? Please elaborate and if you disagree with any, please suggest alternative or additional ones.**

## 7 Annexes

### 7.1 Annex I - Commission mandate to provide technical advice

REQUEST TO THE EUROPEAN SECURITIES AND MARKETS AUTHORITY (ESMA) FOR TECHNICAL ADVICE ON A POSSIBLE DELEGATED ACT SPECIFYING THE CONDITIONS UNDER WHICH THE COMMERCIAL TERMS UNDER WHICH CLEARING SERVICES ARE PROVIDED ARE TO BE CONSIDERED TO BE FAIR, REASONABLE, NON-DISCRIMINATORY AND TRANSPARENT (FRANDT)

With this mandate the Commission seeks ESMA's technical advice on a possible delegated act concerning the European Market Infrastructure Regulation (EMIR<sup>17</sup>) as amended by EMIR REFIT<sup>18</sup> (the "Regulation as amended"). This delegated act should be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

The mandate follows EMIR (Article 82), the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "290 Communication"),<sup>19</sup> and the Framework Agreement on Relations between the European Parliament and the European Commission (the "Framework Agreement")<sup>20</sup>.

According to Article 4(3a) of the Regulation as amended, the Commission is empowered to adopt a delegated act to specify, in relation to the provision of clearing services, the conditions under which the commercial terms are to be considered to be fair, reasonable, non-discriminatory and transparent.

The European Parliament and the Council shall be duly informed about this mandate.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice within the European Securities Committee,<sup>21</sup> the Commission will continue, as appropriate, to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

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<sup>17</sup> 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, OJ L 201, 27.7.2012, p.1.

<sup>18</sup> Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories, OJ L 141, 28.5.2019, p. 42.

<sup>19</sup> Communication of 9.12.2009. COM (2009) 673 final.

<sup>20</sup> OJ L 304, 20.11.2010, p. 47.

<sup>21</sup> Commission's Decision of 6.6.2001 establishing the European Securities Committee, OJ L 191, 17.7.2001, p. 45.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with experts appointed by the Member States within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The powers of the Commission to adopt delegated acts are subject to Article 82 of EMIR. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

## 1. Context

### 1.1 Scope

On 20 May 2019, the European Parliament and the Council adopted EMIR REFIT amending EMIR as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories. EMIR REFIT has been published in the Official Journal on 28 March 2019.

Counterparties that have a limited volume of activity in the OTC derivatives market face difficulties in accessing central clearing, whether as a client of a clearing member or through indirect clearing arrangements. To alleviate the access to central clearing for these counterparties, the Regulation as amended will oblige clearing members and clients which provide clearing services, whether directly or indirectly, to provide those services under fair, reasonable, non-discriminatory and transparent commercial terms without being obliged to contract. The third subparagraph of Article 4(3a) of EMIR empowers the Commission to adopt a delegated act to specify in relation to the provision of clearing services the conditions under which the commercial terms are to be considered to be fair, reasonable, non-discriminatory and transparent, based on the following:

- (a) fairness and transparency requirements with respect to fees, prices, discount policies and other general contractual terms and conditions regarding the price list, without prejudice to the confidentiality of contractual arrangements with individual counterparties;
- (b) factors that constitute reasonable commercial terms to ensure unbiased and rational contractual arrangements;
- (c) requirements that facilitate clearing services on a fair and non-discriminatory basis, having regard to related costs and risks, so that any differences in prices charged are proportionate to costs, risks and benefits; and
- (d) risk control criteria for the clearing member or client related to the clearing services offered.



## 1.2 Principles that ESMA should take into account

On the working approach, ESMA is invited to take account of the following principles:

- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of the Regulation as amended. It should be simple and avoid suggesting excessive financial, administrative or procedural burdens for clearing members and clients.
- When preparing its advice, ESMA should seek coherence within the regulatory framework of the Union.
- In accordance with the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "ESMA Regulation")<sup>22</sup>, ESMA should not feel confined in its reflection to elements that it considers should be addressed by the delegated acts but, if it finds it appropriate, it may indicate guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness.
- ESMA will determine its own working methods depending on the content of the provisions being dealt with. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different standards of work being carried out by the various expert groups.
- In accordance with the ESMA Regulation, ESMA should, where relevant, involve the European Banking Authority and the European Insurance and Occupational Pensions Authority in order to ensure cross-sectoral consistency. It should also cooperate, where relevant, with the European Systemic Risk Board on any issues related to systemic risk.
- In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants in an open and transparent manner, and take into account the resulting opinions in its advice. ESMA should provide a detailed feedback statement on the consultation, specifying when consultations took place, how many responses were received and from whom, as well as the main arguments for and against the issues raised. This feedback statement should be annexed to its technical advice. The technical advice should justify ESMA's choices vis-à-vis the main arguments raised during the consultation.
- ESMA is invited to justify its advice by providing a quantitative and qualitative cost-benefit analysis of all the options considered and proposed. ESMA should provide the Commission with a description of the problem, the objectives of the technical

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<sup>22</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ L 331, 15.12.2010, p. 84.



advice, possible options for consideration and a comparison of the main arguments for and against the considered options. The cost-benefit analysis should justify ESMA's choices vis-à-vis the main considered options.

- ESMA's technical advice should not take the form of a legal text. However, ESMA should provide the Commission with a clear and structured ("articulated") text, accompanied by sufficient and detailed explanations. Furthermore, the technical advice should be presented in an easily understandable language respecting current terminology in the Union.
- ESMA should provide comprehensive technical analysis on the subject matters described in section 3 below, where these are covered by the delegated powers included in:
  - the relevant provision of the Regulation as amended;
  - the corresponding recitals; or
  - the relevant Commission's request included in this mandate.
- ESMA should address to the Commission any question to clarify the text of the Regulation as amended that ESMA considers of relevance to the preparation of its technical advice.

## **2 Procedure**

The Commission is requesting ESMA's technical advice in view of the preparation of a delegated act to be adopted pursuant to the Regulation as amended and in particular regarding the questions referred to in section 3 of this mandate.

The mandate takes into account EMIR (Article 82), the ESMA Regulation, the 290 Communication and the Framework Agreement.

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate will not prejudice the Commission's final decision.

In accordance with established practice, the Commission may continue to consult experts appointed by the Member States in the preparation of delegated acts relating to the Regulation as amended.

The Commission has duly informed the European Parliament and the Council about this mandate. As soon as the Commission adopts the delegated act, it will notify it simultaneously to the European Parliament and the Council.

## **3 ESMA is invited to provide technical advice on the following issues**

ESMA is invited to provide technical advice to assist the Commission in formulating a delegated act to specify, in relation to the provision of clearing services, the conditions under





which the commercial terms are to be considered to be fair, reasonable, non-discriminatory and transparent, based on the following:

- (a) fairness and transparency requirements with respect to fees, prices, discount policies and other general contractual terms and conditions regarding the price list, without prejudice to the confidentiality of contractual arrangements with individual counterparties;
- (b) factors that constitute reasonable commercial terms to ensure unbiased and rational contractual arrangements;
- (c) requirements that facilitate clearing services on a fair and non-discriminatory basis, having regard to related costs and risks, so that any differences in prices charged are proportionate to costs, risks and benefits; and
- (d) risk control criteria for the clearing member or client related to the clearing services offered.

ESMA is invited to ensure where possible consistency with the Union's acquis regarding requirements to use fair, reasonable, non-discriminatory and transparent commercial terms. In this regard, ESMA is invited to also consider requirements which only cover one of the requirements listed above, such as similar references to reasonable commercial terms.

#### 4. **Indicative timetable**

This mandate takes into consideration that ESMA requires sufficient time to prepare its technical advice and that the Commission needs to adopt the delegated acts according to Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 82 of EMIR that allows the European Parliament and the Council to object to a delegated act within a period of 3 months, extendible by 3 further months. The delegated act will only enter into force if neither European Parliament nor the Council has objected on expiry of that period or if both institutions have informed the Commission of their intention not to raise objections.

The obligation to provide clearing services under fair, reasonable, non-discriminatory and transparent commercial terms, will apply as of 18 June 2021<sup>23</sup>. The delegated act should be in place well before then, to allow clearing members and clients that provide clearing services appropriate time to ensure that their commercial terms comply with the new obligation. It is therefore of utmost importance that work on this issue is started as soon as possible.

The deadline set to ESMA to deliver the technical advice is therefore Q1 2020.

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<sup>23</sup> See point (c) of Article 2(2) of the amending Regulation.



## 7.2 Annex II – Cost and Benefit Analysis

### 1. Introduction

Pursuant to the third subparagraph of Article 4(3a) of EMIR, the Commission is empowered to adopt a delegated act to specify the conditions under which the commercial terms for the provision of clearing services are to be considered to be fair, reasonable, non-discriminatory and transparent (FRANDT).

Accordingly, on 26 June 2019, ESMA received a request from the Commission for technical advice on a delegated act supplementing EMIR by specifying the conditions under which commercial terms under the third subparagraph of Article 4(3a) are to be considered FRANDT. The mandate is enclosed in Annex I of this consultation paper. The Commission request sets the deadline for ESMA to deliver the technical advice in Q1 2020.

ESMA has therefore been requested, in addition to the technical advice on the content of the delegated act, to justify its advice by providing a cost-benefit analysis of all the options considered and proposed. This should include identification of the options available and an assessment of the costs and benefits. The results of this assessment should be submitted at the same time as the advice.

In carrying out a cost benefit analysis on the technical advice to the Commission on the proposed delegated act it should be noted that:

96. The main policy decisions have already been taken under the primary legislation (EMIR Refit) and the impact of such policy decisions have already been analysed and published by the European Commission<sup>24</sup>;
97. ESMA does not have the power to deviate from its specific mandate provided by the Commission.
98. ESMA's options are to propose the most adequate provisions on how to specify the conditions under which the commercial terms are to be considered to be fair to comply with the purpose stated by the co-legislators when introducing FRANDT principles in relation to the provision of clearing services and to contribute to the overarching objective of facilitating access to clearing and specially for counterparties with limited volume of activity in OTC derivatives.

### 2. Background

Under the third subparagraph of Article 4(3a) of EMIR, the Commission is empowered to adopt a delegated act on how to specify the conditions under which the commercial terms are to be considered to be fair, reasonable and non-discriminatory under Article 4(3a) of EMIR and ESMA has been mandated to develop and submit to the Commission a technical advice on

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<sup>24</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017SC0148>



how the Commission may specify the conditions under which commercial terms for the provision of clearing services are to be considered FRANDT.

To comply with this mandate, ESMA assessed various approaches considering different levels of disclosure and standardisation, to contribute on one hand, to an increased access to central clearing and on the other hand, to ensure the new requirements would not be too cumbersome or far reaching for the clearing service providers to comply with. The conditions and requirements defining FRANDT commercial terms spans over a wide range of considerations and are a combination of legal, operational, risk and technological components that ESMA proposes as parameters to be assessed when analysing commercial terms for the provision of clearing services.

### 3. Policy Options

Considering that the mandate to ESMA from the Commission is to provide technical advice on the conditions to be considered FRANDT under Article 4(3a) of EMIR, ESMA analysed different levels of requirements in defining such conditions.

### 4. Cost benefit analysis

Below are the different options considered by ESMA on how to specify the conditions under which commercial terms for the provision of clearing services are to be considered FRANDT and the cost and benefit impacts of each of the options.

<b>Specific objective</b>	Facilitate access to central clearing through specifying the conditions that are to be considered when providing clearing services either directly (clearing members) or indirectly (clients of clearing members providing clearing services) under FRANDT compliant commercial terms and for the purpose of increasing access to central clearing primarily for counterparties with limited volume in cleared OTC derivatives.
<b>Policy option 1</b>	To establish limited conditions with requirements under which commercial terms are to be considered, merely supplementing the current framework with some limited conditions, for example in relation to transparency of commercial terms. This option could be justified by the view that FRANDT is already, in the main parts, covered by the current legislation and there is no need for additional requirements to increase access to clearing.
How would this option achieve the objective?	This option would probably result in a very limited added value, probably increasing access to clearing slightly but this would be due to the wide range of actions taken lately within EU, but without addressing concerns raised at different working groups or in policy papers on the accessibility to clearing services. Therefore, this

	option would most likely not further contribute to facilitate access to central clearing.
<b>Policy option 2</b>	To specify the conditions to be considered FRANDT by establishing a principle-based approach based on the existing requirements under EMIR, but which further specifies and facilitates comparability of the information disclosed, addresses the process of onboarding clearing clients and encouraging further standardisation of contractual terms.
How would this option achieve the objective?	This option would build on the existing EMIR requirements introducing elements of harmonisation and standardisation. This principle-based approach would provide for minimum requirements on legal, operational, risk and technology aspects.
<b>Policy option 3</b>	To specify the conditions to be considered FRANDT by establishing a prescriptive format and content of the contractual and commercial terms for providing clearing services, unifying the risk parameters, the technological minimum requirements and the contractual and commercial terms used by clearing service providers.
How would this option achieve the objective?	This option would provide for a higher degree of comparability of commercial terms but could have unintended consequences making the process of onboarding and providing clearing services disproportionately burdensome.
Which policy option is the preferred one?	Option 1 does not introduce added value to the pre-Refit framework, where disclosure is already a requirement. Option 3 would risk a disproportionately burdensome process that could have a negative impact on the freedom of contract of market participants and result in less access to clearing if envisaged by clearing providers as too burdensome. For that reason, the policy option 2 is the most appropriate and proportionate approach to apply in specifying the conditions to apply in the determination of FRANDT compliant commercial terms and finding a balance between being too granular and prescriptive and not achieving the objective of contributing to increase access to clearing by facilitating the process of onboarding clearing clients and the overall access to central clearing.
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to	ESMA is only providing a technical advice to the Commission which has the liability to define which option to choose for its Delegated Act.

be informed or consulted?	
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<b><i>Impacts of the proposed policies:</i></b>	
<b>Policy option 1</b>	
Benefits	The benefits of this option would be limited as the regulatory framework of EMIR before Refit already mandates transparency requirements for certain aspects included in the commercial terms and therefore, additional transparency requirements would not represent an innovation that could facilitate access to clearing.
Regulator's costs	Regulators would bear similar costs than today and should supervise compliance with the transparency conditions (the existing requirements before Refit and the additional ones), however the supervisory work would have a limited impact in facilitating access to central clearing.
Compliance costs	The costs for clearing service providers will be similar to the costs of clearing service providers today to comply with the already existing transparency requirements and probably without contributing to further facilitate access to central clearing.
<b>Policy option 2</b>	
Benefits	It would ensure a certain level of granularity in the information to be disclosed and would allow clearing clients to compare such information while leaving room for market competition and freedom to contract. Clear visibility of the steps for the onboarding process and the standardisation where possible of contractual terms would enhance trust between the parties, reduce the timings to set up clearing arrangements and facilitate access to central clearing.
Regulator's costs	The costs for regulators would be similar to the existing requirements under EMIR, where regulators have to supervise compliance of the transparency requirements and, at the same time, the standardisation of contractual terms would facilitate supervisory activity.
Compliance costs	The costs for clearing service providers would be similar or slightly higher to the costs today to comply with the already existing transparency requirements. Clearing service providers would keep their own practices and only adapting them where necessary. The introduction of the policy option 2 would not represent a major cost

	as it codifies, to a certain extent, many of the existing market practices.
<b>Policy option 3</b>	
Benefits	It will ensure a high degree of comparability across offerings of clearing services by unifying all conditions to offer clearing services taking into account the risk, legal, technological and operational elements.
Regulator's costs	The costs for regulators could be higher than for the option 1 and option 2 as the requirements would be much more prescriptive but possibly easier to supervise. However, there is a regulatory risk of hindering competition and making the provision of clearing services too burdensome and unattractive.
Compliance costs	The costs for clearing service providers will be higher with this option because clearing service providers would have to change the way in which they are offering clearing services and would have to adapt their processes.

**Q. 5: Do you identify other benefits and costs not mentioned above associated to the proposed approach (option 2)? If you advocated for a different approach, how would it impact this section on the impact assessment? Please provide details.**



### **7.3 Annex III – Summary of Questions**

Q. 1: Do you generally agree with the approach on transparency and how to publicly disclose fees and commercial terms and other conditions? Please elaborate and if you disagree with any specific requirement, please suggest alternative ones. You can also suggest additional ones.

Q. 2: Do you generally agree with the elements to be taken into consideration in the commercial terms for the provision of clearing services? Please elaborate and if you disagree with any specific element, please suggest alternative ones. You can also suggest additional ones.

Q. 3: Do you generally agree with the suggestions to assist in facilitating access to clearing services? Do you generally agree with the requirements listed to ensure prices are fair, proportionate and non-discriminatory? Please elaborate and if you disagree with any specific element, please suggest alternative ones. You can also suggest additional ones.

Q. 4: Do you generally agree with the proposed elements regarding the risk control criteria? Please elaborate and if you disagree with any, please suggest alternative or additional ones.

Q. 5: Do you identify other benefits and costs not mentioned above associated to the proposed approach (option 2)? If you advocated for a different approach, how would it impact this section on the impact assessment? Please provide details.

## 7.4 Annex IV Draft technical advice to specify FRANDT

This annex presents an illustration of the draft technical advice on how to specify conditions under which the commercial terms under which clearing services are provided are to be considered fair, reasonable, non-discriminatory and transparent (FRANDT), which could be transposed in the Commission's Delegated Act:

### Article 1

#### Public disclosure of information

1. For the purpose of specifying the conditions under which the commercial terms referred in Article 4(3a)(a)-(d) of Regulation (EU) 648/2012 are to be considered to be fair, reasonable, non-discriminatory and transparent, the following non-exhaustive list of aspects shall be taken into consideration:

- (a) the onboarding process;
- (b) risk control criteria and categorisation of clients;
- (c) standard contractual terms for the provision of clearing services;
- (d) technological requirements;
- (e) fees structures; and
- (f) additional services.

2. Clearing service providers shall publicly disclose all the information related to Article 2(1)(a)-(f) of this Delegated Act and make it freely accessible and available on their website according to the relevant provisions in Articles 2 to 6.

### Article 2

#### Onboarding process

1. Clearing service providers shall publicly disclose and clearly display on their websites all the steps and information in relation to their onboarding process to provide visibility on the onboarding process and allow clearing clients to assess the different steps to undertake and the requirements to fulfil in order to become a clearing client to the clearing service provider. The information shall be collected at a separate webpage (within their website) and it shall be easy to access, clearly marked with the word "Onboarding procedures and requirements to clear" and the information shall be complete. The information shall include at least the following information:

- (a) a description of the process for onboarding;

- (b) an action list for onboarding, clearly listing the different steps the clearing client will have to take within the onboarding process;
- (c) the document set containing all standard contractual terms relevant for different services;
- (d) cost of the onboarding and registration process as further specified under Article 6;
- (e) fee lists setting out the fees for the different services offered by the clearing service provider separated by client clearing categories in a format as required by Article 6;
- (f) expected timeline from application to the clearing client has completed the onboarding process and may use the services as covered by the contractual terms;
- (g) the scope of the services offered;
- (h) the main aspects of the clearing service providers client clearing categorisation according to Article 3;
- (i) minimum technological requirements as required by Article 5; and
- (j) the applicable margin model.

2. As part of the onboarding process, clearing service providers shall assess clearing clients applying to clear through the clearing service provider against the risk control criteria. According to its pre-defined and publicly disclosed client clearing categorisation criteria under Article 3, the clearing service provider shall assign a category and shall communicate it to the relevant clearing client within the initial phase of the onboarding process.

3. The onboarding process shall avoid unjustified and unproportionate on-boarding requirements and a clearing service provider shall carefully design any procedural steps and different deadlines for deliveries to ensure they are not unreasonable or disproportionately costly or cumbersome for the clearing client.

4. Unless agreed by the parties, the contractual terms agreed at the time of onboarding should remain applicable throughout the life of the contract except where the clearing service provider changes the client clearing categorisation according to Article 3 of this Delegated Act or when a change to the contract terms are required by applicable law or the rules of the CCP.

### Article 3

#### Risk control criteria and categorisation of clients

1. Clearing service providers shall publicly disclose the risk control criteria used to assess the risk profile of clients applying to clear through the clearing service provider. Based on the risk control criteria, clearing service providers shall define different categories in which to classify clearing clients according to their risk profile. Detailed information on the factors considered





and for which purpose they are assessed in the determination of the client clearing categorisation shall be publicly disclosed.

2. The clearing service provider may consider the following non-exhaustive list of aspects in relation to identifying its risk control criteria:

- (a) credit strength;
- (b) internal risk control systems;
- (c) trading strategy;
- (d) payment systems, liquidity and arrangements to ensure a timely transfer of assets, cash or margin;
- (e) systems settings to respect any maximum trading limit agreed;
- (f) collateral management including access to eligible collateral;
- (g) operational resources; and
- (h) any involvement in a breach of rules ensuring the integrity of financial markets, such as money laundering, market abuse or financial crime.

3. Clearing service providers shall assess and communicate the category clearing clients are assigned. Any subsequent change to the category of a client shall be justified in writing detailing the reasons for the category change and detailing the risk factors used and the respective assessment of such risk factors by the clearing service provider in its decision to change its initial categorisation of the clearing client.

## Article 4

### General contractual terms

1. Clearing service providers shall publicly disclose the general standard contract terms under which they provide clearing services, presented in clearly divided sections, including scope and definitions, information, relationships between clearing service provider and client, termination and default provisions.

2. The fair, reasonable and non-discriminatory contractual terms should be standardised and applied to all the clearing clients within the same client clearing categorisation in a non-discriminatory manner.

3. The general standard contract terms may be complemented by schedules and annexes to cater for amendments, election or additions to the standardised contract terms where justified by credit risk or other business requirements. The annexes shall include pre-defined sets of elections but may also contain contract terms only relevant to the clearing client, however such additional contract terms shall be reasonable and justified. The provisions under the general



standard contract terms, in the schedule and in the annexes should avoid resulting in provisions that are overlapping or contradictory. Contractual terms shall also avoid termination notice periods shorter than 6 months unless such period is reasonable and justified.

4. Where the contract terms include jurisdictionally mandated requirements, the contract shall explicitly include the content of such provisions and avoid simply referencing them. To the extent contract terms do not derive from regulatory requirements, this should be stated in the contract terms and an explanation should be provided.

5. Changes to commercial terms including fees, shall be reasonable, justified and applied equally to all clearing clients within the same client clearing categorisation, to the extent possible. The parties shall not change the commercial terms unilaterally, except where agreed by the parties or where they derive directly from a change in the applicable regulation or the rules of the relevant CCP. In such case, the changes shall be communicated (where possible) with sufficient notice period and with the justification for the change clearly provided.

## Article 5

### Technological requirements

1. Clearing service providers shall publicly disclose on their websites the technological requirements needed to onboard clearing clients and for the provision of clearing services with justification of the requirements for the particular services offered.

2. Clearing service providers should distinguish different levels of technology requirements for services with different levels of complexity, offering the possibility to access clearing for simple and standardised products with a simplified technological setup.

3. Any technological requirements associated to the provision of additional services should be clearly separated from the offering of clearing services. Such requirements should be publicly disclosed in accordance with Article 6(8).

## Article 6

### Fees Structure

1. Clearing service providers shall publicly disclose the total set of fees for providing clearing services separated by the different fees charged per service and per type of client clearing categorisation.

2. Fees and price lists should be complete, detailed and presented in a clear manner that allows clearing clients to easily understand and compare the fees applying to the offered clearing service.

3. Clearing service providers shall determine the price structure that best suits their business model but shall disclose the fees to increase transparency and facilitate comparability across offerings of clearing services.



#### 4. Onboarding fees

- (a) Onboarding fees shall represent a one-off cost for the clearing client payable at the beginning of the relationship with the clearing service provider.
- (b) All fees related to the onboarding process shall be publicly disclosed and freely available on the clearing service provider website.
- (c) The disclosure of the onboarding fees may include at least the following;
  - (i) registration fee;
  - (ii) fee for the set-up of IT systems at the clearing service provider and where needed at the CCP;
  - (iii) fee for the initial assessment of the client clearing categorisation.
- (d) The amounts of the onboarding fees may depend on the clearing client category in which the clearing service provider categorises the clearing client according to provisions in Article 3.

#### 5. Fixed fees

- (a) Fixed fees shall represent the fees that are payable periodically by the clearing client.
- (b) The fixed fees shall be clearly publicly disclosed and shall include, at least:
  - (i) annual fixed or minimum revenue fees;
  - (ii) fees to cover IT infrastructure costs;
  - (iii) fees for the maintenance of the different types of accounts (i.e. omnibus segregated account (OSA), individual segregated amount (ISA), gross omnibus account (GOSA));
  - (iv) fees for collateral management and transformation.
- (c) The amount of the fixed fees will depend on the client clearing category in which the clearing service provider classifies the clearing client, according to provisions in Article 3.
- (d) Clearing service providers shall identify within the fixed fees the fees that directly derive from fees charged by the CCP to the clearing service provider.

#### 7. Transaction fees

- (a) Transaction fees shall represent and the clearing service providers shall disclose the fee for clearing the asset classes that are subject to the clearing obligation, by

specifying the standard fee to clear one transaction; 20 transactions; 50 transactions; 100 transactions; 500 transactions; 1,000 transactions and by specifying any other transactional based fees, including margins and collateral.

(b) The amount of the fees per transaction will depend on the risk category in which the clearing service provider classifies the clearing client according to provisions in Article 3.

(c) Clearing service providers, shall identify within the fixed fees the fees that directly derive from fees charged by the CCP to the clearing service provider.

## 8. Fees for additional services

(a) Fees for the provision of additional services required for the provision of clearing services shall be publicly disclosed and available on the website of the clearing service provider. Each fee should be identified and associated to the service offered.

(b) Any fees for the management of collateral and optimisation of collateral where required as part of the provision of clearing services shall be specified providing at least the following information, where applicable:

(i) fees calculated in relation to basis points of the initial margin posted;

(ii) fees for management of cash and non-cash collateral;

(iii) fees for collateral conversion; and

(iv) fees for risk reduction services and/or optimisation of collateral, such as netting and compression services.

## 9. Discounts and rebates

The clearing service provider may apply discounts and rebates. The conditions for benefitting from such discounts and rebates shall be publicly disclosed and available on the clearing service provider website in a manner that is clear and easily readable and allow clearing clients to understand how discounts and rebates are calculated. Discounts and rebates shall be based on objective criteria such as, but not limited to, volumes, client clearing categorisation and clearing patterns.