

EFAMA reply to the ESMA Consultation Paper on the Draft technical advice on commercial terms for providing clearing services under EMIR (FRANDT)

EFAMA¹ agrees with the approach and, more generally, with the findings highlighted by ESMA in its report on the implementation of the conditions under which the commercial terms are to be fair, reasonable, non-discriminatory and transparent (FRANDT) when providing CCP clearing services to clients.

Requiring compliance with core principles relating to fairness and non-discrimination helps to ensure decisions regarding whether to provide clearing to a client, and the associated commercial terms, are based on legitimate commercial considerations. **In that perspective, the recognition by the co-legislators of the need to treat small financial counterparties differently should be reflected in the services and prices offered by Clearing Members.**

Consequently, we **encourage ESMA** to:

- **further define these requirements in a more granular and well-balanced way** to ensure there is robust and harmonised application of these rules across clearing members, while minimising the possibilities of “arbitrage” at the detriment of smaller clearing clients. This would incentivise small and medium sized Asset Managers to use more client clearing services, hinging SFC to access a CCP via a clearing broker based on an economically viable solution;
- **not consider RCB criteria for granted** when assessing the implementation of FRANDT. As explained in [our reply to the recent ESMA consultation on consolidated tape and access to market data](#), the asset management industry considers that not all the benefits of MiFID II have been offered by services providers yet. Clearing and associated data license costs should in principle be based only on the incremental/marginal cost of providing and distributing a given clearing/data service. All clearing service prices, and terms & conditions should be made transparent to the users as proposed in chapter 6.1.;
- **extend FRANDT principles to all services required in EMIR Refit**, and not only for centrally cleared transactions; and

¹ EFAMA is the voice of the European investment management industry, representing 28 member associations, 59 corporate members and 22 associate members. At end 2018, total net assets of European investment funds reached EUR 15.2 trillion. These assets were managed by almost 62,000 investment funds, of which more than 33,000 were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining funds composed of AIFs (Alternative Investment Funds). For more information about EFAMA, please visit www.efama.org

- more importantly, **qualify the clearing service as an investment service under the Annex I of MiFID II**. ESMA's report focuses on the commercial aspects of the relationship between the clearing service provider and the clearing client but not enough on the responsibilities of the providers. The clearing members offer financial services, like other financial commercial service that should be treated as such and included the Annex I of MiFID II. However, it is not the case and it appears that unbalanced contract clauses, and even clauses that cause a real legal risk for funds and asset managers, are imposed by the clearing service providers to their clients, possibly due to a limited number of clearing service providers and CCPs. Therefore, we recommend ESMA to ensure coordination between regulatory measures or to suggest changes to the legislation to ensure insertion of clearing activities in the list of financial services.

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.

We agree with ESMA's approach and generally with the findings highlighted by ESMA in its reports. We support the provisions to have minimum notice period of 6 months for termination of clearing services by a clearing member, to avoid significant risks to continuity of trades for client clearing. A shorter minimum notice period, combined with the difficulties of porting, particularly in a stressed period, can lead to trades being liquidated if an alternate clearing member is not found. We therefore fully support the long termination period of 6 months proposed by ESMA.

We also consider that one of the overarching goals of the EMIR Refit legislation is to facilitate client access to clearing by requiring clearing members to provide clearing services on fair, reasonable, non-discriminatory, and transparent terms.

The EMIR refit legislation itself requires clearing members to adopt "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".

It is crucial that, within a Bank, the clearing arm can act independently from the trading business in a fair, reasonable, and non-discriminatory manner. ESMA should clarify that the trading personnel should not influence or interfere with the decisions of clearing personnel regarding (i) whether to provide clearing services to a customer, and (ii) the commercial terms offered to a clearing customer, including fees.

Equally, our opinion is that the basis for determining these offers (notably via the client clearing categorisation) should:

- not be left to the suppliers' discretion, as in that case offers might not be completed, willingly or due to frequently changing operational environment; and
- should be limited to a reasonable number of categories, based on transparent criteria.

This clarification would help to implement FRANDT in a meaningful way that will improve access to clearing and bring concrete benefits to clearing customers.

Ensuring that clearing members are required to address potential conflicts of interest is vital to give substance and render effective the FRANDT requirement. It will contribute to removing impediments for European clients clearing in the EU.

Moreover, it will ensure an alignment and level playing field with the US, where similar requirements have already been implemented. Such clarification is consistent with rules already adopted in the US.

Regarding the calculation of fees, we consider that:

- the cascading list of fees presents the risk of forgetting some fees such as the fees charged by the CCP;
- the contributions to the CCP default fund should clearly be excluded from these fees;
- the changes in fees must also be submitted to a notice period of 6 months after their communication to the client.

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.

We agree with ESMA's approach, particularly the 6 months' notice period for termination of clearing services by a clearing member.

In addition, we want to raise ESMA's awareness on legislation such as Article 50-1, g), (iii) of the UCITS Directive that imposes on UCITS the following obligations: "the OTC derivatives are subject to reliable and verifiable valuation on a daily basis and can be sold, liquidated or closed by an offsetting transaction at any time at their fair value at the UCITS' initiative", provision that is mirrored in the contract regulating the relationship between counterparties.

These requirements are specific to invest funds and need to be taken into account. We therefore ask ESMA to possibly imposing dedicated provisions on Clearing Members.

We also want to ask to extend the proposed 6 months' notice period to all modifications of contractual terms, including fees schedules.

(See also our reply to question Q1)

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.

We agree with ESMA's approach.

(See also our reply to question Q1)

We want to insist also on the notion of proportionality in prices and fees as highlighted in §84.

We consider that SFC should not be listed in less favourable categories because:

- SFCs are recognised as bearing lower risks to market; and
- SFCs require less full-time equivalent to serve them due to their directional activities and their limited compression rate

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.

We agree with ESMA's approach.
(See also our reply to question Q1)

We nevertheless wish to insist on the need to disclose publicly customers clearing categorization. However, we fear that each supplier will present its own categories – which would then prevent the customer from comparing offers. Therefore, we would recommend ESMA to impose a minimum canvas and minimum information that clearing services providers should provide and maintain.

Regarding the calculation of risk measures as described in §91, we consider that CM are defining their fees based on the risk taken and should not be allowed to restrict the type of collateral eligible or impose haircut. The CM should therefore be forced to allow all assets that are eligible at CCP level as eligible collateral. Acting differently is detrimental to clearing and increasing the risks supported by SFCs.

Lastly, we regret the lack of proposed solution in the absence of, or refusal to grant access to, a clearing service as restated in § 87 and 88.

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.

We agree with the option 2 as proposed by ESMA, as the *de minimis* approach.

We would encourage ESMA to add additional elements to improve legal certainty and comparability, such as a unique reporting format and a basic data set to ensure comparability between services.

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