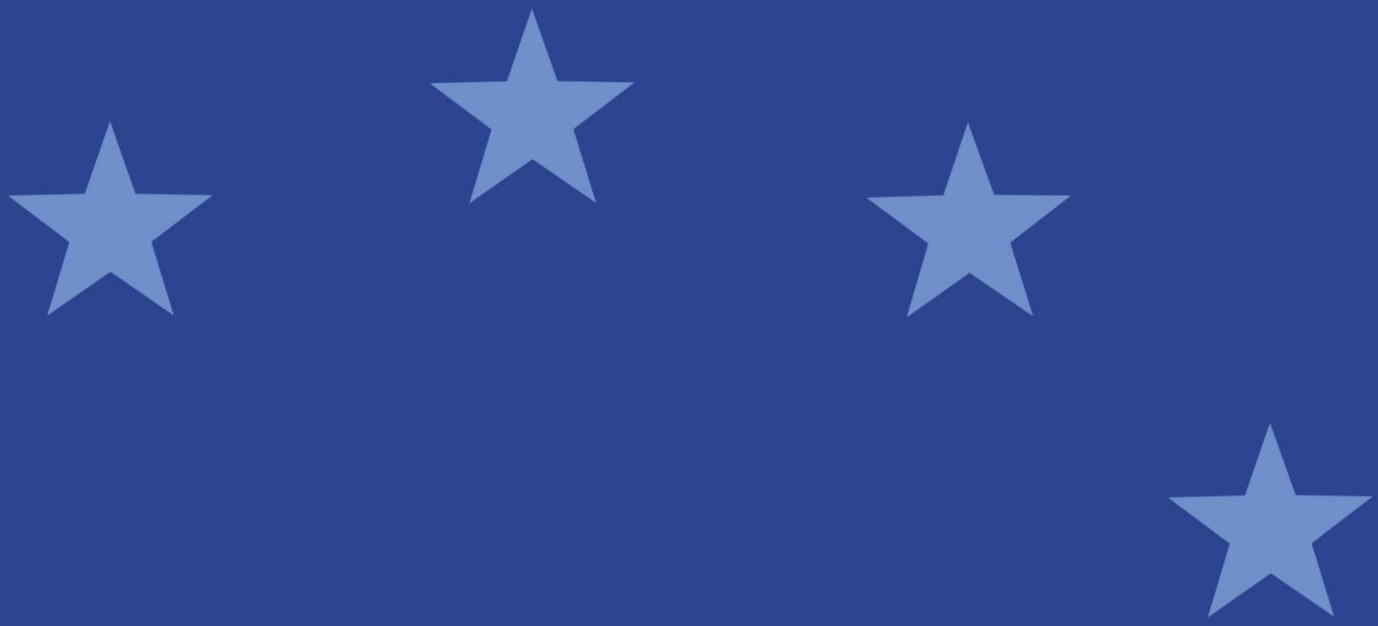
esma European Securities and Markets Authority

Final Report

Technical advice on FRANDT commercial terms for clearing services (Article 4(3a))



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1 Executive Summary

Reasons for publication

On 20 May 2019, the European Parliament and the Council adopted Regulation (EU) 2019/834 EMIR Refit, amending Regulation (EU) 648/2012 EMIR. The new provisions of EMIR contain the requirements applicable to 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).

Under the new FRANDT regime the Commission is empowered to adopt a delegated act specifying the conditions under which the commercial terms are to be considered to be fair, reasonable, non-discriminatory and transparent. The Commission had to endeavour to consult ESMA before adopting such a delegated act. ESMA received a mandate in June 2019 to provide technical advice for the development of the corresponding Delegated Act. ESMA published a Consultation Paper with its draft technical advice on how to specify the FRANDT criteria on 3 October 2019. The consultation ended on 2 December 2019. ESMA received 19 answers, out of which 3 were confidential. The FRANDT requirements start to apply on 18 June 2021 in accordance with Article 2(c) of EMIR Refit.

This final report provides the 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 when providing clearing services to clients in accordance with Article 4(3a) of EMIR. This Final Report takes into account the feedback provided by the respondents to the consultation.

Contents

This Final Report presents ESMA's final technical advice. Section 2 contains the introduction, Section 3 provides the FRANDT principles, Section 4 provides the scope of FRANDT principles, Section 5 contains considerations on public disclosure and transparency, Section 6 provides the principles for on-boarding, Section 7 to 10 consider how to further specify FRANDT in relation to risk assessments, fees, contract terms and technology and Section 11 contains reflections on enforcement of FRANDT. The Annexes contains the mandate for ESMA to develop this technical advice (Annex I), the cost-benefit analysis (Annex II), the final technical advice (Annex III) and the Advice of the Securities and Markets Stakeholder Group (Annex IV).

Next Steps

ESMA is providing its technical advice to the Commission. The Commission is empowered to adopt delegated acts in accordance with Article 82 of EMIR to supplement EMIR by specifying the conditions under which the commercial terms are to be considered to be fair, reasonable, non-discriminatory and transparent.

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[1].

2. EMIR requires a wide range of counterparties to clear OTC derivatives that are covered by the clearing obligation through central counterparties (CCPs)[2]. To comply with this requirement, counterparties must become clearing members, clients, or must establish indirect clearing arrangements with clearing members or clients.

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 the clearing obligation under EMIR. 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 areas identified as one which could benefit from targeted actions to ensure 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. To increase and facilitate access to clearing additional measures have been introduced in EMIR, 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 to offer clearing services under commercial terms considered fair, reasonable, non-discriminatory and transparent (principles known as FRANDT). Two other important initiatives that mitigate the issue of access to central clearing are the limitation of the scope of the clearing obligation introduced under EMIR Refit and the amendments under CRR in relation to the leverage ratio in relation to the clearing client.

5. Article 4(3a) of EMIR[3] sets out the obligation on clearing service providers (CSPs) which provide clearing services, whether directly or indirectly, to provide those services under

[1] 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
[2] Article 4 of EMIR refers to the clearing obligation.
[3] Complemented by the explanation in Recital 11 of EMIR.

fair, reasonable, non-discriminatory and transparent commercial terms (FRANDT) and FRANDT will be specified by the 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 June 2021 in accordance with Article 2(c) of EMIR Refit. On 26 June 2019 ESMA received a request from the Commission for a 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 FRANDT, pursuant to the third subparagraph of Article 4(3a) of EMIR.

6. On 3 October ESMA launched a public consultation on "Draft technical advice on commercial terms for providing clearing services under EMIR (FRANDT)[4]" with the deadline for consultation responses on 2 December 2019. The public consultation aimed at receiving stakeholders' feedback on a list of questions and on ESMA's draft technical advice to the Commission on how to specify the conditions under Article 4(3a) of EMIR. ESMA received 19 responses to the consultation[5], of which 3 were confidential. ESMA also consulted the SMSG. The feedback was provided by a variety of respondents, including representatives from clearing members and clearing clients and therefore, ESMA considers having gathered an adequate range of views. However, the responses contained very different views on how the commercial terms should be considered to be FRANDT compliant.

7. For the purpose of this final report, a clearing service provider (CSP) 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 CSP.

3 The FRANDT principles

3.1 Introducing FRAND(T) and other initiatives

8. The difficulties in accessing central clearing whether as a client of a clearing member or through indirect clearing arrangements have been identified as a concern. The Final Report[6] of ESMA 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[7].

[4] https://www.esma.europa.eu/press-news/consultations/consultation-draft-technical-advice-commercial-terms-providing-clearing
[5] https://www.esma.europa.eu/press-news/esma-news/esma-publishes-responses-received-its-frandt-consultation
[6] https://www.esma.europa.eu/sites/default/files/library/2016-1565_final_report_on_clearing_obligation.pdf
[7] 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

9. Several possible reasons for the insufficient access to clearing services and the lack of incentive to provide clearing services have been 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 the capital requirements regulation (CRR)[8]. Also, 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 and 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"[9].*

10. The amendments to EMIR introduce several different measures to facilitate access to clearing, for example EMIR contains the new FRANDT[10] requirements, requiring CSPs to use not only "reasonable commercial terms" but to ensure that the commercial terms used are also fair and non-discriminatory. Another amendment to EMIR was the scope of the clearing obligation which has been narrowed. Financial counterparties (FCs) are now only subject to the clearing obligation where they exceed the clearing threshold, aiming to reduce the scope of the clearing obligation for FCs with a low volume of OTC derivatives activity. Moreover, non-financial counterparties (NFCs) are now only subject to the clearing obligation for those classes of OTC derivatives for which they exceed the clearing threshold.

11. Another essential action addressing the access to clearing is the amendment under CRR which 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[11]". This will limit one significant disincentive for banks to offer clearing services and is envisaged to positively contribute to the access issue.

12. It is noted in the responses that the new provisions to increase access to clearing or reduce the clearing obligation are in the process of being applied or assessed hence its effects are going to be known over time. One respondent noted that ESMA should be mindful to ensure that any new requirement imposed on CSPs to implement FRANDT and improve access to clearing should be proportionate to address the remaining

[8] This has recently been addressed by the 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 .

[9] Impact assessment, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012, page 43. https://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-148-F1-EN-MAIN-PART-1.PDF

[10] The Council and the Parliament included the aspect of transparency and hence the acronym was amended to FRANDT.

[11] Regulation (EU) 2019/876 of 20 May 2019 amending Regulation (EU) No 575/2013.

obstacles and deliver the benefits and policy objectives pursued by EMIR Refit. The entry into force of the FRANDT requirement is foreseen in two years after the entry into force of EMIR Refit and it is yet too early to tell if and how different actions may have addressed and increased the access to clearing. Another aspect noted in the responses is that whilst certain obstacles to clearing have been addressed, and some may be addressed through FRANDT, there are issues which FRANDT itself cannot solve, such as the lack of consistency in the application of global capital rules. It is also noted that FRANDT should be formulated to take into account future changes to capital frameworks.

13. ESMA agrees that the 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. 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. It is also noted that the reduction in scope of the clearing obligation on certain entities has significantly reduced the number of entities subject to the clearing obligation. However, the effect these measures will have, in solving the pre-existing problems to access clearing, is to be confirmed overtime as there may still be an interest to clear voluntarily due to, for example, price structures and other applied conditions.

3.2 A reflection on FRANDT

14. It is noted that FRANDT rules that are well-calibrated and not unduly restrictive will be important for supporting the European Commission's Capital Markets Union (CMU) initiative, as developing a strong capital markets in Europe will depend on the existence of efficient and commercially viable post-trade services. Several respondents note that although some of the proposed FRANDT requirements could or will improve the position for certain clearing clients they will need to be carefully calibrated to ensure to add value to already existing requirements and when considering FRANDT this assessment will need to be put into context of other rules applying in the broader context within which CSPs operate. It is clear that the FRANDT rules need to strike the right balance between on one hand the interest of improving clearing client's access to clearing services and ensuring such services are provided on FRANDT compliant terms and on the other hand ensuring the CSPs providing clearing services are allowed to run commercially viable and risk prudent businesses. It is noted that the FRANDT requirements should not result in price regulation nor in an obligation to contract and CSPs should be permitted to control the risks related to the clearing services offered, such as counterparty risks.

15. Compliance with the FRANDT requirements is an ongoing obligation and concepts such as reasonableness and fairness are not frozen in time and what is reasonable at one point in time may not be reasonable one year after. This is an aspect that CSPs will take into account to ensure that their terms for offering clearing services remain FRANDT compliant throughout the life of the contractual arrangement between the CSP and its clearing client. One respondent noted that whilst it is clear that the FRANDT principles

apply at all times this may be a concern if the FRANDT requirements are too detailed as this would likely increase compliance costs and that this aspect should be taken into account when drafting the rules.

16. It was raised in the responses that before adopting new requirements that would specify the conditions under which commercial terms in clearing agreements would be considered to be fair, reasonable, non-discriminatory and transparent, an assessment of the real impact of additional rules should be made, in particular considering whether further rules are needed in addition to the changes to EMIR and other rules impacting the offering of clearing services. ESMA agrees with this observation but notes that FRANDT is a requirement under EMIR. ESMA is given the mandate to provide a technical advice on how FRANDT is to be specified and this will result in new considerations the CSPs will have to assess where relevant in their offering of clearing services to be compliant with FRANDT. It is also noted that it is very difficult at this stage to assess how the different actions taken jointly will increase the access to clearing, hence FRANDT is envisaged to be reviewed and further evaluated.

17. Another aspect noted in the responses is the development of other initiatives to improve access to clearing for certain counterparties, such as indirect clearing models for OTC derivatives. These aspects were not considered in the consultation paper and will not be in this final technical advice, but it is noted that alternative established models for OTC derivatives clearing could be developed in the coming future and could facilitate the goal of improving access to central clearing for clearing clients that have a limited volume of activity in the OTC derivatives market.

18. EMIR Refit requires ESMA to report to the Commission, in June 2023, 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[12] the Commission will undertake in four years-time (June 2024). It is noted that the overall picture should not be lost, such as the stability of the regulation and the burdens associated with constantly changing and expanding complex regulatory requirements as such uncertainty will work as a strong disincentive for institutions to establish or expand client clearing services. Based on this, ESMA is of the view that requirements proposed in this final technical advice should be a combination of well-considered targeted actions complemented with some market led initiatives. Also, in light of the responses to the consultation some of the initial proposed requirements have not been included in this final report. Depending on the outcome of the scheduled review further actions might be needed to address any shortcomings in the provision of and access to clearing services for clearing clients.

[12] Article 85(1) and (2) of EMIR.

3.3 The FRANDT obligation in Article 4(3a) of EMIR

19. Article 4(3a) of EMIR contains the obligation on CSPs 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.

20. Article 4(3a) 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. However, it is noted that there is no obligation to contract for the CSP, that there is equally no obligation for CSPs to provide clearing services and that FRANDT does not create a price regulation and that CSPs should be permitted to control the risks related to the clearing services offered, such as counterparty risks.

21. ***The first principle of FRANDT*** is set out in Article 4(3a)(a) of EMIR and focuses on fairness and transparency in relation to fees, costs and general contractual terms and conditions. Fairness represents equal treatment of cases with similar circumstances and transparency requires visibility of fees, costs, general contractual terms and the conditions for price lists. The remit of such transparency is to respect the boundaries of confidentiality of contractual arrangements between individual counterparties.

22. To provide the clearing clients with relevant information to assess its costs of using different clearing services is crucial to ensure FRANDT is complied with. Whilst the prices and fees are publicly disclosed today, as per the EMIR and MiFID II[13] requirements, the presentation and comparability of the information has been noted as an area for improvement. To ensure clients have visibility on the costs to clear transactions with a certain CSP ESMA suggests to improve the transparency undertaken in accordance with the disclosure requirements applicable today and to provide some requirements on the bilateral disclosure to ensure the clearing clients have visibility as to the costs a CSP charge for the clearing services relevant to the clearing client.

23. ***The second principle of FRANDT*** is set out in Article 4(3a)(b) of EMIR and focuses to ensure the terms under which clearing services are offered constitute reasonable, unbiased and rational commercial terms.

24. All clearing clients should be treated fairly, and all contracts should be on armlength terms, meaning that the two parties should owe no special obligation or privilege to the other party. This approach would set the grounds for unbiased and rational contractual terms. This is also reflected under the new requirement to manage and control any conflict of interest in the provision of clearing services. Also, whilst stipulating the

[13] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU OJ L 173 12.6.2014, p. 349. Recast can be found here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014L0065-20200326

requirements for commercial terms has to be reasonable, one has to bear in mind the underlying contractual freedom.

25. ***The third principle of FRANDT*** is set out in Article 4(3a)(c) of EMIR and focuses on providing 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.

26. Facilitating clearing services starts with ensuring that the access to clearing is facilitated and this is considered under the section on onboarding and provides some requirements on the process for onboarding. This principle also contains the requirement that any differences in prices charged are proportionate to costs, risks and benefits. The CSP should be able to describe differences in fees based on the factors listed under EMIR. As further explained in the section 'Onboarding' below, ESMA suggests a three-step approach to provide clarity in the process to access clearing services. In the light of this, CSPs would make publicly available a standardised form of Request for Proposal (RFP) that should be filled out and submitted to the CSP by a counterparty interested in becoming a clearing client (prospective clearing client). This RFP would be responded to with a detailed Proposal made by the CSP to the prospective clearing client and it would serve as a base for negotiating the contract terms between the CSP and the client. Finally, after a successful negotiation, the CSP would send the Agreed Terms to the clearing client. The use of a standardised RFP, Proposal and Agreed Terms should provide the clearing client with transparency on the onboarding process, the costs and prices for the service.

27. ***The fourth principle of FRANDT*** is set out Article 4(3a)(d) of EMIR and focuses on ensuring that the risk assessment is relevant and justified, however bearing in mind that current regulations requires CSPs to control the risks related to the clearing services offered, such as counterparty risks. The FRANDT requirement stipulates that the CSPs may consider risks, hence CSPs may refuse to provide clearing services on grounds of risk not limited to counterparty risk.

28. Where a CSP shall decide to offer clearing services to an applicant clearing client, it shall undertake its assessment of such prospective clearing client respecting the FRANDT based principles whilst taking into account the nature, scale and complexity of the prospective clearing client's business and considering risk related aspects.

3.4 General feedback

29. The consultation period on FRANDT ended the 2 December 2019. Many, if not all respondents, fully support the goal of improving access to clearing and ensuring that clearing services are provided on fair, reasonable, non-discriminatory and transparent commercial terms, however the responses appear to be divided into two main categories on how the actual terms should be assessed to be compliant with FRANDT. FRANDT principles might increase compliance cost of clearing service providers unless structured

in a balanced manner to make sure that they achieve their final objective of facilitating access to clearing.

3.4.1 Supportive of ESMA's proposal

30. Respondents supporting the approach considered by ESMA are mainly representatives of the clearing clients and are of the view that ESMA has approached its work in a comprehensive and well-considered manner and welcome the level of detail that has been provided with respect to the principles associated with the FRANDT concept. ESMA is encouraged to further define in its technical advice the proposed requirements in a more granular and well-balanced way to ensure there is a robust and harmonised application of these rules across CSPs, while minimising the possibilities of "arbitrage" at the detriment of smaller clearing clients.

31. It is noted in the responses that clearing clients with a limited volume of clearing activity generally face difficulties to find clearing members willing to set up legal and operational arrangements to access CCPs and as a result some counterparties today elect not to transact in transactions subject to the clearing obligation. Clearing services provided on FRANDT compliant terms would incentivise small and medium sized clients to increase the use of client clearing services and by requiring compliance with FRANDT principles this would help to ensure that the decisions to provide clearing services to a client, and the associated commercial terms, are based on legitimate commercial considerations.

32. The findings highlighted by ESMA are overall supported and the proposals are also supported as targeting the right issues. These respondents encourage ESMA to suggest to the Commission to properly implement the FRANDT concept through Level 2 measures to ensure that it is effective in its goals and that FRANDT has the potential to improve significantly the access of buy-side market participants to central clearing and the terms of which such access is provided. These respondents encourage ESMA and, ultimately, the Commission to ensure that this detailed approach is reflected in the final Level 2 measures and they encourage the National Competent Authorities ("NCAs") to pay close attention to the FRANDT provision in their supervision.

3.4.2 Challenging ESMA's proposal

33. Respondents challenging the approach considered by ESMA are mainly representing CSPs and are of the view that ESMA's proposal is too intrusive on the CSPs business and its ability to make proper risk assessments. In particular, the following proposals are criticised:

(a) The proposal of client classification is challenged on the basis that CSPs will each have their own client classification criteria reflecting their risk policies and clearing offerings, therefore ESMA's proposals will not ensure comparability between clearing offerings and will therefore not deliver meaningful benefit for clients.

(b) Prescriptive requirements and limitations on clearing service agreements are challenged on the basis that specifying prescriptive requirements and limitations on clearing service agreements will significantly reduce the ability of CSPs to appropriately manage the risks associated with provision of clearing services, thereby increasing the risk associated with clearing without increasing access to clearing.

(c) Public disclosures of contractual terms and fees are challenged as not contributing to ensuring rational commercial terms and these respondents consider that transparency can be improved without requiring public disclosure.

(d) The proposal for a public webpage dedicated to the onboarding process with a requirement for CSPs to make a generic onboarding process outline available to potential clients on request is challenged as too costly without clear benefit to potential clearing clients.

34. It is noted by respondents that ultimately these proposed FRANDT requirements may restrict CSPs' ability to carry out a commercially profitable business, disincentivise the provision of clearing services and create an even higher barrier for new clearing firms to enter the market and may result in higher costs for clients. Hence, the respondents challenging ESMA's proposal are of the view that, if these proposals are not modified and addressed, these key concerns will severely impact CSPs' ability to properly risk manage their clients with the result that many CSPs may cease to provide clearing services altogether. A number of unintended consequences follow from this result including more limited access to clearing and increased systemic risk for the clearing industry resulting from a concentration of risk to fewer CSPs, which is the opposite of what FRANDT is aiming to achieve.

3.5 FRAND(T) in light of existing framework

35. It was raised by several respondents to the consultation that EMIR and MiFIR[14]/MiFID[15] already contain requirements on entities providing clearing services and that it is important that the FRANDT principles add value. Hence, FRANDT should build on the existing requirements in particular for the current requirements for public disclosure and risk assessments.

3.5.1 Existing FRAND(T) framework in the EU

36. In the mandate to ESMA the Commission invited ESMA to seek coherence with the current regulatory framework of the Union. ESMA analysed the use and application of

[14] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 Text with EEA relevance. OJ L 173, 12.6.2014, p. 84–148. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0600

[15] Directive 2014/65/EU (cit.)

FRAND or FRANDT principles[16] in different subject areas, including its connection to the overarching principles of competition in the Treaty on the Functioning of the European Union (TFEU)[17] 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[18].

3.5.2 Transparency and public disclosure

37. EMIR already (before the Refit amendment) contain public disclose of prices, conditions and fees associated with the services provided, for example;

- Article 38(1)[19] of EMIR states that a CCP[20] and its clearing members shall ***publicly disclose the prices and fees*** associated with the services provided and that such disclosure shall be provided for each service separately, including discounts and rebates and the conditions to benefit from those reductions.

- Commission Delegated Regulation 149/2013 (IC RTS)[21] stipulates that where clearing members and clients (CSPs) provide indirect clearing services, they should ***publicly disclose the general terms and conditions*** under which such services are provided.

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[16] The difference between FRAND and FRANDT is that 'Transparent' has been added to the Fair, Reasonable, Non-Discriminatory principles.

[17] 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

[18] There are provisions related to FRANDT principles in MiFIR (Article 37as clarified by Recital 40) 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 of EMIR) on access to information held in trade repositories.

[19] Article 38 Transparency

1. A CCP and its clearing members shall publicly disclose the prices and fees associated with the services provided. They shall disclose the prices and fees of each service provided separately, including discounts and rebates and the conditions to benefit from those reductions. A CCP shall allow its clearing members and, where relevant, their clients separate access to the specific services provided.

A CCP shall account separately for costs and revenues of the services provided and shall disclose that information to the competent authority.

[20] This obligation also applies to Tier 2 CCPs. EMIR Article 25(2b)(a) and the related infringement under Annex III (IV) includes the infringement for Tier 2 CCPs "infringes Article 38(1) by not publicly disclosing the prices and fees of each service provided separately including discounts and rebates and the conditions to benefit from those reductions."

[21] RTS 149/2013 on indirect clearing;

Article 2

1. A client may only provide indirect clearing services to indirect clients provided that all of the following conditions are fulfilled:

(b) the client provides indirect clearing services […] publicly discloses the general terms and conditions under which it provides those services;

Article 4

1. A clearing member that provides indirect clearing services […] shall publicly disclose the general terms and conditions under which it provides those services.

The general terms and conditions referred to in the first subparagraph shall include the minimum financial resources and operational capacity requirements for clients that provide indirect clearing services.

- Article 39(7)[22] of EMIR states that the CCPs and clearing members shall ***publicly disclose the levels of protection and the costs associated with the different levels of segregation of accounts*** that they provide. In relation to indirect clients, there are similar requirements requiring clearing members and clients that provide indirect clearing services to publicly disclose the general terms and conditions under which they provide those services[23].

- MiFID II requires that clearing firms[24] should comply with Article 17(6) of MiFID II and the disclosure requirements as set out in Article 27 of the Commission Delegated Regulation 2017/589 (RTS 6)[25], requiring a clearing firm to ***publish the conditions under which it offers its clearing services*** and that it shall offer those services on reasonable commercial terms.

38. The disclosure requirements pursuant to Article 38 of EMIR would apply to the CSPs such as clearing members. However, it seems that the scope of public disclosure may be limited to clearing members and would not necessarily include clients providing indirect clearing services. It is also noted that the public disclosure requirement under MiFID II is applicable to clearing firms defined as an "*an investment firm acting as a general clearing member to support the provision of its clearing services to its clients shall be subject to appropriate due diligence assessments, controls and monitoring*". This definition suggests that the requirements under MiFID II are more limited in its applicability than FRANDT. Based on these considerations, ESMA would suggest public disclosure to be made in a consistent and harmonised way, and hence the public disclosure as set out in the articles above should apply to all CSPs when offering clearing services covered by the FRANDT requirements.

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[22] Article 39 Segregation and portability (EMIR)
7. CCPs and clearing members shall publicly disclose the levels of protection and the costs associated with the different levels of segregation that they provide and shall offer those services on reasonable commercial terms. Details of the different levels of segregation shall include a description of the main legal implications of the respective levels of segregation offered including information on the insolvency law applicable in the relevant jurisdictions.
[23] RTS 149/2013 on indirect clearing;
Article 4(2): A clearing member that provides indirect clearing services shall open and maintain at least the following accounts in accordance with the request of the client […].
Article 5(1): A client that provides indirect clearing services shall offer indirect clients a choice between at least the types of accounts referred to in Article 4(2) and shall ensure that those indirect clients are fully informed about the different levels of segregation and the risks associated with each type of account.
[24] Clearing firm means in the Commission Delegated Regulation 2017/589 "an investment firm acting as a general clearing member ('clearing firm') to support the provision of its clearing services to its clients shall be subject to appropriate due diligence assessments, controls and monitoring".
[25] Article 27 (Commission Delegated Regulation 2017/589, RTS 6, MIFID II).
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0589&from=EN
Disclosure of information about the services provided (Article 17(6) of Directive 2014/65/EU)
1. A clearing firm shall publish the conditions under which it offers its clearing services. It shall offer those services on reasonable commercial terms.
2. A clearing firm shall inform its prospective and existing clearing clients of the levels of protection and of the costs associated with the different levels of segregation it provides. Information on the different levels of segregation shall include a description of the main legal effects of the respective levels of segregation offered, including information on the insolvency law applicable in the relevant jurisdiction.

3.5.3 Requirements for CCPs on transparency

39. CCPs are under the obligation to publicly disclose the prices and fees associated with the services provided under Article 38 of EMIR[26]. The CCP shall in addition provide the competent authority with the costs and revenues of the services provided. It is noted by one of the respondents that the fees charged by the CCPs to some extent influence or even dictate the fees applied by the CSPs and that ESMA should take this into account in its suggestions to the Commission on how to frame the FRANDT principles.

40. There is a new requirement under EMIR[27] by which a CCP shall provide its clearing members with a simulation tool allowing them to determine the amount of additional initial margin (IM), on a gross basis, that the CCP may require upon the clearing of a new transaction and with information on the IM models it uses. Respondents advocated for such information also to be shared with the clearing clients. Whilst ESMA have sympathy for the request ESMA considers that the benefit of this provision compared to the cost of complying does not justify this requirement at this stage and this requirement has therefore not been included in this final technical advice. However, where a CSP share such tools and information to clearing clients such activity should be compliant with the FRANDT principles, i.e. shared on a fair and reasonable basis.

3.5.4 Requirements on clearing firms providing clearing services

41. Article 17(6) of MiFID II[28] and Article 25 of RTS 6[29], contain a set of requirements clearing firms have to take into account in its initial assessment of a prospective clearing client.

> *Extract from Article 25 of RTS 6:*
>
> *Due diligence assessments of prospective clearing clients*
>
> *1. A clearing firm shall make an initial assessment of a prospective clearing client, taking into account the nature, scale and complexity of the prospective clearing client's business. Each prospective clearing client shall be assessed against the following criteria:*

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[26] Article 38 Transparency
1. […] A CCP shall account separately for costs and revenues of the services provided and shall disclose that information to the competent authority. […]

[27] Article 38(6) EMIR, "A CCP shall provide its clearing members with a simulation tool allowing them to determine the amount of additional initial margin, on a gross basis, that the CCP may require upon the clearing of a new transaction. That tool shall only be accessible on a secured access basis, and the results of the simulation shall not be binding."
Article 38(7), "A CCP shall provide its clearing members with information on the initial margin models it uses. That information shall:
(a) clearly explain the design of the initial margin model and how it operates;
(b) clearly describe the key assumptions and limitations of the initial margin model and the circumstances under which those assumptions are no longer valid;
(c) be documented."

[28] MiFID II High Frequency Trading; Article 17(6)
An investment firm that acts as a general clearing member for other persons shall have in place effective systems and controls to ensure clearing services are only applied to persons who are suitable and meet clear criteria and that appropriate requirements are imposed on those persons to reduce risks to the investment firm and to the market. The investment firm shall ensure that there is a binding written agreement between the investment firm and the person regarding the essential rights and obligations arising from the provision of that service.

[29] The Commission Delegated Regulation 2017/589 RTS 6 Article 25.

(a) credit strength, including any guarantees given;

(b) internal risk control systems;

(c) intended trading strategy;

(d) payment systems and arrangements that enable the prospective clearing client to ensure a timely transfer of assets or cash as margin, as required by the clearing firm in relation to the clearing services it provides;

(e) systems settings and access to information that helps the prospective clearing client to respect any maximum trading limit agreed with the clearing firm;

(f) any collateral provided to the clearing firm by the prospective clearing client;

(g) operational resources, including technological interfaces and connectivity;

(h) 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.

42. ESMA notes that again the requirements applicable to a clearing firm[30] are more limited than the FRANDT's applicability to CSPs hence a similar approach applies here as under transparency. ESMA will require the CSPs to undertake their risk assessment in accordance with the requirements as stipulated under Article 25 of the RTS 6 and FRANDT will build on these requirements for further specifying FRANDT commercial terms.

3.5.5 Requirements for reasonable commercial terms

43. EMIR and MiFID II also contain requirements for commercial terms to be reasonable.

- MiFID II requires that clearing firms[31] ***shall offer those services (clearing services) on reasonable commercial terms*** as set out in Article 17(6) of MiFID II and further in Article 27 of the RTS 6[32].

- Article 2(1) and 4(1)[33] in the IC RTS, clearing members and clients that provides indirect clearing services **are required to provide such services on *reasonable commercial terms***.

[30] Commission Delegated Regulation 2017/589 "an investment firm acting as a general clearing member ('clearing firm') to support the provision of its clearing services to its clients shall be subject to appropriate due diligence assessments, controls and monitoring".
[31] Clearing firm means in the Commission Delegated Regulation 2017/589 "an investment firm acting as a general clearing member ('clearing firm') to support the provision of its clearing services to its clients shall be subject to appropriate due diligence assessments, controls and monitoring".
[32] Article 27 (Commission Delegated Regulation 2017/589, RTS 6, MIFID II).
Disclosure of information about the services provided (Article 17(6) of Directive 2014/65/EU)
1. A clearing firm shall publish the conditions under which it offers its clearing services. It shall offer those services on reasonable commercial terms.
[33] RTS 149/2013, Article 2(1) stipulates that on of the requirements for the provision of indirect clearing services by clients to be fulfilled is that "(b) the client provides indirect clearing services on reasonable commercial terms and publicly discloses the general terms and conditions under which it provides those services;"

- Article 39(7)[34] of EMIR stipulates that a CCPs and clearing members shall offer services of segregation ***on reasonable commercial terms.***

44. The requirements for reasonable commercial terms apply to clearing members in relation to segregation of accounts and to clearing members in relation to the provision of indirect clearing services and to clearing firms under MiFID II, however as the obligations are not further specified under the existing regulations, EMIR requirements on commercial terms being FRANDT will establish a common ground for fair and reasonable commercial terms when providing clearing services.

4 Scope of FRANDT principles

4.1 Applicability of FRANDT to OTC derivative contracts

45. The consultation paper notes that because FRANDT is placed within Article 4 of EMIR[35] which refers to the 'Clearing obligation', FRANDT applies to "*OTC contracts pertaining to a class that has been declared subject to the clearing obligation under EMIR*". This limitation of the FRANDT requirements has raised several comments. While some respondents welcomed this clarification, others considered a wider application of the FRANDT principles necessary to avoid unintentional side effects noting that a division of the market is unpractical, unclear and not logical, as arguably the underlying FRANDT principles should be equally relevant for all types of transactions.

46. It is noted by respondents that the FRANDT provisions are specifically designed to increase client access to central clearing, regardless of whether or not a specific instrument is subject to the EMIR clearing obligation. Clients wishing to clear (a) single-name CDS, (b) FX non-deliverable forwards, or (c) interest rate swaps and index CDS not subject to the clearing obligation should benefit from the FRANDT provisions in the same manner as a clients clearing IRS positions that are covered by the EMIR clearing obligation hence, as in the respondents view there is no legal basis for limiting the application of FRANDT only to transactions subject to the clearing obligation. Based on this some respondents strongly urge ESMA to clarify the general applicability of the FRANDT requirements to all derivatives clearing services in the final report and they would welcome that ESMA extends the FRANDT principles to cover all derivatives available for clearing at CCPs in EU without differentiation on the counterparty status of the clearing client, so that the real economy and in particular commodity firms (most of which are NFCs that are below the clearing thresholds hence not subject to the clearing

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Article 4(1), "A clearing member that provides indirect clearing services shall do so on reasonable commercial terms and shall publicly disclose the general terms and conditions under which it provides those services."

[34] Article 39 Segregation and portability (EMIR)

7. CCPs and clearing members shall publicly disclose the levels of protection and the costs associated with the different levels of segregation that they provide and shall offer those services on reasonable commercial terms.

[35] This interpretation is in line with ESMA's Q&As that the provisions of Article 4 of EMIR and Article 2 of Commission Delegated Regulation (EU) No 149/2013 on indirect clearing apply only to OTC derivatives and not to all products due the placement in Article 4 of EMIR and that they are for the purpose of meeting the clearing obligation.

obligation for the relevant asset class (NFC-)) can take advantage of the FRANDT requirements.

47. The actual article on FRANDT is silent on the scope of contracts it applies to. Building on the fact that FRANDT is introduced under Article 4 of EMIR, means it covers OTC derivative contracts. However, there are three main possible applications of the FRANDT requirements to OTC derivative contracts.

    (1) **The first option** is the extensive application of FRANDT to all OTC transactions cleared by a CCP. This interpretation is not directly supported by EMIR due to the fact that whilst the FRANDT principle is not expressly limited to OTC derivative contracts subject to the clearing obligation, the requirement to comply with FRANDT requirements is located under Article 4 (3) of EMIR which refers to the 'Clearing obligations'.

    (2) **The second option** is to apply FRANDT to all OTC derivatives subject to the clearing obligation. This approach focuses on transactions subject to the clearing obligation and FRANDT principles applying to OTC derivative contracts subject to the clearing obligation. This is a transaction-based approach and would mean that FRANDT would apply to counterparties clearing transactions subject to the clearing obligation, hence would include when financial counterparties that are below the clearing thresholds i.e. not subject to the clearing obligation (FC-) and NFC- voluntarily clear transactions subject to the clearing obligation.

    (3) **The third option** is to apply FRANDT only to OTC transactions subject to the clearing obligation and only where the counterparty clearing such transactions are subject to the clearing obligation.

48. In considering the applicability of FRANDT principles, it is to be noted that ESMA has consistently followed the activity of counterparties with limited volume of activity, e.g. ESMA published the Final Report on the clearing obligation for FC with a limited volume of activity[36] before the clearing regime for FC and NFCs was amended by the EMIR Refit. In addition, pursuant to the amendments to EMIR, ESMA is mandated to review the clearing thresholds and propose, if need be, an amendment to the current framework. This review will be accompanied by a mapping exercise of the counterparties that are currently subject to the clearing obligation. This will provide a picture of the counterparties that clear voluntarily and may be an opportunity for the Commission to more thoroughly assess the impact of FRANDT principles if only applied to counterparties subject to mandatory clearing.

49. ESMA notes that the question on the scope of FRANDT is indeed a question of interpretation of the applicability and scope of EMIR, which is outside the ESMA mandate. ESMA though, notes that the applicability of FRANDT to the commercial terms

[36] https://www.esma.europa.eu/sites/default/files/library/2016-1565_final_report_on_clearing_obligation.pdf

applying where entities voluntarily clear transactions subject to the clearing obligation would benefit from being clarified by the Commission as it is not clear from EMIR. ESMA notes that where a limited application of FRANDT would be applied, such interpretation should be balanced against the aim of FRANDT, for example where clearing entities benefitting from the FRANDT requirements will have to create duplicative systems to access different clearing services subject and not-subject to FRANDT, such practices could well be contrary to the aim of FRANDT. It is however also noted that CSPs may voluntarily, in their provision of clearing services, provide all clearing services on FRANDT compliant terms. However, one concern noted is that the respondents supporting a limitation in FRANDT are primarily the CSPs[37] and this could imply a limited application of FRANDT is envisaged.

4.2 Territorial scope of FRANDT

50. Some respondents requested that the territorial scope of FRANDT should be clarified in the final technical advice noting that clearing is a global business and CSPs are competing in an international environment. Respondents highlighted the importance to ensure a fair level playing field between EU providers and their international competitors regarding the FRANDT requirements.

51. FRANDT applies to CSPs providing clearing services and, based on this, the respondents would like to obtain a confirmation that the requirements will apply to all clearing members (established in EU or not) and all clients (established in EU or not) that provide clearing services in the EU. The scope of FRANDT will follow the assessment and considerations as outlined above but it may be noted that if FRANDT is limited to the transactions subject to the clearing obligation then clearing should be undertaken through a CCP authorised or recognised in the EU to be able to meet the requirement of the clearing obligation[38].

52. ESMA has considered the scope of FRANDT principles vis-à-vis CSPs but notes that considerations on the scope of FRANDT are not within the mandate given to ESMA and that the FRANDT's scope derives from Article 4(3a) of EMIR. However, the scope of FRANDT is essential as a too limited applicability could result in an unlevel playing field within the EU and this would be very unfortunate. There are several aspects to consider in assessing if FRANDT should apply to CSPs established outside the EU. ESMA has for example noted the following:

    (1) The obligation to provide clearing services under fair, reasonable, non-discriminatory and transparent commercial terms applies to clearing members and clients which provide clearing services, whether directly or indirectly. ESMA notes that the

[37] This may be noted in the responses where for example ISDA "strongly supports (…) that the scope of the FRANDT regime under Article 4(3a) of EMIR is limited to OTC derivatives which are subject to the mandatory clearing obligation."
[38] Note that the clearing obligation can only be met at a CCP authorized or recognized.

definitions of clearing member[39] and client[40] are not limited to the EU and hence the obligation should apply to all CSPs providing clearing services in the EU for transactions covered by the FRANDT requirements through a recognised or authorised CCP.

(2) It is also noted that Article 4 of EMIR has a wide territorial applicability as the clearing obligation also applies to transactions entered into between two entities established in one or more third countries that would be subject to the clearing obligation if they were established in the Union, provided that the contract has a direct, substantial and foreseeable effect within the Union or where such an obligation is necessary or appropriate to prevent the evasion of any requirement of this Regulation.

53. If the conclusion would be that FRANDT applies to any clearing member, both established in the EU or not and to any client, both established in the EU or not, such CSPs would be obliged to comply with FRANDT requirements where providing clearing services in the EU through a recognised or authorised CCP. ESMA would strongly support this scope of FRANDT as it would treat all CSPs equally when providing clearing services in EU and would ensure a level playing field within the Union.

4.3 Potential tiered/segregated application of FRANDT

54. Another aspect noted in the responses on the scope of FRANDT is if its applicability could be applied based on a classification. Some respondents provided some thoughts as to who is to benefit from the protection under FRANDT and if such protection is actually needed due to the sophistication of this market. Although Article 4 of EMIR does not expressly capture it, in its recital, EMIR refers to counterparties having a limited volume of activity in the OTC derivatives, noting that FRANDT could arguably be limited in scope.

55. The assumption that the consultation paper targets retail customers is not correct, but as per EMIR, it has been identified that 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 however all clearing clients may benefit from the FRANDT requirements where clearing certain transactions. ESMA notes that it could be more relevant to ensure the commercial terms are FRANDT compliant for counterparties that are less used to access clearing services or clears less volume than some of the larger clearing clients. In preparation of this final report ESMA has considered this aspect, if it is possible to tier the application of the FRANDT requirements differently depending on the size and characteristics of the CSPs, taking into account aspects such as whether a CSP is systemic for a given clearing service. ESMA has however not been able to identify how a tiered approach

[39] EMIR 2(14) 'clearing member' means an undertaking which participates in a CCP and which is responsible for discharging the financial obligations arising from that participation;
[40] EMIR 2(15) 'client' means an undertaking with a contractual relationship with a clearing member of a CCP which enables that undertaking to clear its transactions with that CCP;

could fit within the empowerment regarding FRANDT, to further specify FRANDT, and noting that the requirement under EMIR applies to the CSP to ensure the CSP complies with the FRANDT requirements and there is no tiering of clearing clients for the purpose of FRANDT envisaged in EMIR.

4.4 Conflict of interest

56. EMIR also contains a new requirement in Article 4(3) of EMIR to mitigate conflict of interest[41]. Although the mandate does not explicitly require the delegated act to further specify the conflict of interest[42] it is noted by several respondents that conflict of interest is relevant in the assessment of the FRANDT principles to ensure that the purpose of FRANDT is achieved. It is very important for the CSPs to ensure that the conflict of interest is considered and managed and in particular in relation to areas such as onboarding, fees and commercial terms.

5 Public disclosure and transparency

5.1 Public disclosure

57. Many respondents agree with ESMA's proposal to increase transparency for clearing services. However, several respondents representing CSPs, strongly disagree with detailed public disclosure of costs, fees and contractual terms as this type of information is proprietary, confidential and commercially sensitive and hence, these respondents advocate that further disclosure than currently requested should not be required. It is noted that generic disclosures without any reference to individual clients seldom provide a useful comparison and may potentially be misleading and that the actual price charged to a client is only known once the CSP has considered the client's portfolio, transaction scope and the specific requirements of the client and hence to publish information on fees, is not possible before reasonable checks have occurred.

58. Another aspect raised as a concern is the level playing field in relation to the amount of information to be made public, for example, if CSPs are required to make a large amount of information public when providing clearing services under EMIR, this will result in a cost for the CSP and indirectly for the clearing client and such costs may not apply to CSPs providing clearing services under other regulatory regimes.

[41] "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."
[42] "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: […]"

59. Today there are several requirements for publicly disclosure of prices, fees, costs and terms and conditions as noted above[43]. However, primarily three issues have been identified in relation to the existing requirements for public disclosure;

(1) The current obligations for public disclosure have not provided clearing clients with enough information and the way the information is presented seems to have limited the use and intended benefits of it.

(2) The scope of the current requirements for public disclosure may be more limited than the scope of the FRANDT transparency requirements.

(3) The current requirements are not covering all the relevant aspects in relation to the clearing service to ensure visibility for clients as to costs, terms and requirements.

60. As previously mentioned, public disclosure is regulated in EMIR and MiFID II. The public disclosure has been challenged as lacking in usefulness and clarity and this is also one of the reasons there is now an additional requirement in EMIR under FRANDT for transparency with respect to fees, prices, discount policies and other general contractual terms and conditions regarding the price list and, as mentioned above, that any differences in prices charged should be proportionate to costs, risks and benefits. ESMA further notes that the Council and the Parliament would not likely have added transparency specifically as one of the requirements to ensure FRANDT if the current disclosure requirements were working effectively.

61. ESMA would encourage CSPs to revise how they currently present their offers of clearing services to ensure they are presented in a clear and easily comparable manner and this could be achieved in a market led initiative to ensure information is published in a consistent format. ESMA will also consider publishing guidelines, if needed, to further ensure information is published in a consistent and harmonised manner to ensure comparability between CSPs.

62. Based on the above, ESMA suggests following a dual approach for disclosure, where CSPs publicly disclose information mainly under existing regulations and in addition disclose details of the services and conditions offered through the RFP and the subsequent Proposal made by the CSP bilaterally to the prospective clients. The aim is to shift most of the public disclosure proposed in the initial proposal to a bilateral disclosure regime.

63. Based on this, ESMA would propose public disclosure for the following information;

(1) **Current public disclosure requirements**. ESMA would suggest that CSPs should publicly disclose the conditions under which they offer their clearing services together with the prices and fees associated with the services provided, including discounts and

[43] See 'Transparency and public disclosure' above.

rebates and the conditions to benefit from those reductions, based on the current requirements under MiFID II and EMIR.

(2) **Onboarding.** The initial proposal for a public webpage dedicated to onboarding was challenged as too burdensome and not providing enough added value to clients compared to the costs of establishing such webpage. It was recommended to replace the public webpage dedicated to the onboarding process with a requirement for CSPs to make a generic onboarding process outline available to potential clients on request. ESMA agrees that any requirement should be justified by adding value and would agree to replace the initial request for a website with a document provided as part of the onboarding process. Hence, ESMA would suggest, to ensure accessibility to clearing services, that a CSP should have a high-level onboarding framework publicly available of the onboarding process based on current public information but also providing the main details of its onboarding process and the key documents required to be provided by the prospective clearing client to the CSP, for the CSP to provide a well-considered and suitable proposal to the prospective clearing client.

(3) **Public disclosure of fees ex-post.** The initial proposal contained requirements for the CSP to publicly disclose on a yearly basis the fees and costs charged by the CSP per class of instrument and per client clearing category. This was criticised based on concerns for proportionality, relevance and confidentiality.

"By publishing an actual range of fees, an educated market observer could make a reasoned guess as to the fees paid by specific entities given general market knowledge about which clients clear with which CSPs. It could also enable well educated and informed market participants to make estimates of the likely typical sizes of risk positions being held by those same participants".

64. ESMA has considered how fees should be made public and would agree not to include the initial proposal to ex-ante publicly disclose the fees and costs in significant details but to instead include the applicable fees in the Proposal and Agreed Terms to enhance transparency and harmonisation in the clearing offers.

65. In addition, to provide the visibility ex post of fees and costs charged by the CSP or indeed other CSPs, ESMA has explored different options to disclose information either publicly or by request from prospective clearing clients. However, such proposals may be challenged due to the level of details as such disclosure should not reveal sensitive or confidential information nor active market positions and such disclosure could have unintended consequences, such as anti-competitive behaviour or market abuse concerns.

66. Consequently, ESMA considered the option where CSPs would submit, upon the request by the NCA, the ex post disclosure of fees. Such confidential disclosure would be based on the type of fees envisaged in the Proposal (separated by client, asset class and per type of transaction on an average basis) and would be easily comparable to the fees published by the CSP (envisaged to follow a clear structure). This approach (ex-post

fees disclosure vis-à-vis the NCA), would provide the NCA with information on the fees charged to clearing clients and, would at the same time, work as an incentive for CSPs to ensure the publicly available disclosure is clear and contains up to date information.

5.2 Client categorisation

67. ESMA explored in the initial proposal for CSPs to freely define groups of categories of clients as 'client categorisation' to disclose estimative costs for each kind of category. In addition, the CSP was proposed to publicly disclose the risk control criteria used to classify its clearing clients in a way that would allow clients to understand to which category they pertained and consequently, the estimative fees that would apply to counterparties with their characteristics. ESMA based this proposal on the fact that currently, CSPs are already conducting risk assessments of clearing clients and therefore could, in a not too burdensome exercise, prepare categories of counterparties with similar volume of activity and similar characteristics, e.g. same sector counterparties, operating with similar trading strategies or in same markets, etc. The proposal aimed at allowing comparability of fees between different CSPs and also in relation to peer clearing clients.

68. However, the 'client categorisation' raised many comments in the consultation and while generally respondents would support the underlying idea of providing clear disclosure to market participants, quite a few respondents challenged the proposal for several reasons, including the arguments that;

- A standard system of client classification does not as such exist today, and it would not be possible to implement it in a way that would deliver meaningful benefit for clients;

- Risk assessments are fundamental and individually assessed by CSPs and can and should not be limited under FRANDT;

- Risk assessments are not related to fees as fees are not only related to credit risk but driven also by volume and type of transactions cleared hence client categorisation (as a risk driven framework) is therefore unsuitable to determine the level of fees; and

- The use of 'client categorisation' might be expensive and burdensome and may create systemic risks in the market by segmenting clearing clients into buckets.

69. Other market participants supported the suggestion of 'client categorisation' as it would assist in transparency for clearing clients, however noting that the proposal would not be efficient in its current form because the definition of the categories of clients should not be left to the CSPs' discretion as this could possibly lead to constant changes and several different categorisations across CSPs creating more confusion for clients than assisting in transparency and making it difficult to compare commercial terms and conditions.

Hence, if ESMA were to keep the categorisation of clients, the categories should ideally be predefined in the delegated act.

70. ESMA has explored the possibility to establish the client categories in the regulation rather than asking the CSPs to establish their client categorisations, however there are two main hurdles for doing so. One is the lack of an existing categorisation used by the market to apply here as creating (by regulation) a new client categorisation is both costly and burdensome for CSPs to implement. The other hurdle concerns the risk aspects and the scope of such a classification, as according to respondents, risks are not determinative for the fees and hence the categorisation may be misleading.

71. ESMA agrees that any requirement should be justified by added value and ESMA finds that the benefit of this provision is uncertain and to introduce a pre-decided classification structure by law will incur costs for the CSPs, hence ESMA will not pursue the 'client categorisation'. However, ESMA's concern remains in the current inability for clearing clients to gain visibility and understanding of how fees are charged and why different fees are charged to different clients. The fundamental question also remains, how to ensure clearing clients are treated equally and fairly considering the type of entity they are, their credit risk and the type of clearing they undertake.

5.3 The RFP, Proposal, Agreed Terms

72. One suggestion provided by some respondents is to establish an industry standard onboarding procedure that CSPs could use to provide information about their clearing services and any documentation requirements necessary to onboard a clearing client. This would enable clients to use this as a base and to supplement it with questions for additional information.

73. ESMA found this proposal interesting and has considered how it could be used within the concept of FRANDT to address the current shortcomings of transparency and access to clearing. ESMA notes that transparency may be accomplished both through public disclosure and through bilateral disclosure. ESMA envisages that the RFP would be for the prospective clearing client to submit to the CSP and for the CSP to respond to. Based on the RFP, ESMA has created a three-step approach to document the process to set up clearing arrangements; this onboarding procedure are further elaborated on under the section on 'Onboarding'.

74. ESMA would advocate that the information provided in the RFP, Proposal and Agreed Terms should be using a harmonised naming convention in relation to, for example, scope of the offer and fees. One source to use would be to 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. ESMA would anticipate that the use of harmonised references could be achieved in a market led initiative.

6 Onboarding

75. 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.

76. The onboarding 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. Today the requirements to be met by clearing clients can 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.

77. ESMA envisages that a structured approach for the onboarding process with standardised steps and clear information on the process would assist in meeting the fairness and transparency requirements and would equally assist in complying with the requirement to facilitate clearing services on a fair and non-discriminatory basis. This approach may also assist in providing a method to ensure that differences in prices charged are proportionate to costs, risks and benefits. Finally, such a standardised approach could also take into consideration the requirement under FRANDT to ensure the fairness, reasonableness and visibility of the risk control criteria used by the CSP for the clearing services offered as further discussed below.

78. A harmonised approach would bring clarity and trust when a clearing client is looking to join a CSP and would simplify the comparison between different providers, but it will not assist the client in comparing the Proposal it receives with the Proposals its peers receive. A comparison between peers may be undertaken by NCAs in their ordinary supervision and additional considerations on this may be found under ‘Enforcement of FRANDT’.

79. It is the responsibility of the CSPs to ensure both the contract terms proposed in the Proposal and the Agreed Terms are FRANDT compliant. It is crucial and of utmost importance that the new requirements for managing conflicts of interests are carefully considered and respected in the onboarding process, as per Article 4(3a) first paragraph of EMIR.

6.1 Request for Proposal (RFP)

80. The process to set-up clearing arrangements is initiated by the prospective clearing client submitting a request for proposal (RFP) to a given CSP. The RFP, in addition to the

publicly available information on the onboarding process, needs to be accompanied by a list of documents a CSP needs to receive to prepare a Proposal of clearing services that considers the specific profile of the client. This list of documentation could include the financial statements of the client and any other relevant document such as the bylaws, proof of the required licenses or authorization needed to conduct the clients' business or audits that can impact the assessment of the client's risk profile.

6.2 Proposal

81. The CSP, after being approached by a prospective clearing client, would provide such client with a Proposal for the provision of clearing services that should follow a standardised approach and would serve as the starting point for a bilateral negotiation of commercial conditions.

6.2.1 The onboarding process and onboarding fees

82. The Proposal sent to the prospective clearing client should contain detailed information in relation to the onboarding process. It should contain a description of the process, an action list with all the information and documentation that the client should provide to the CSP in addition to the information required under the RFP (e.g. regarding KYC procedures, governance documentation, financial statements, etc) and an estimated timeline based on the different steps in the process to allow clients to foresee the estimated total length of a successful onboarding. It is also noted that time estimations will depend on the diligence and prompt action of the client in dealing with the different steps.

83. The Proposal should also detail any costs or fees that would be charged to a client for its onboarding. The onboarding fees should be clearly identified in the Proposal in a way that is easily readable and understandable. Where a CSP does not apply onboarding fees separately but where such fees are included under the fixed fees, the CSP should clearly disclose that the fixed fees also contain such onboarding fees. More information on the different kind of fees can be found under section the 'Onboarding fees' and 'List of fees'.

6.2.2 Terms and conditions for providing clearing services

84. The Proposal sent to the prospective clearing client should also contain all key information and requirements for provision of the requested clearing services, an illustrative example is inserted below. This Proposal would enable the clients to compare, on a one to one basis, between different offers made by CSPs.

85. The Proposal in relation to the terms and conditions would contain all the relevant information to be reflected in the contract to set up clearing arrangements, including:

    a) The **scope of the services** offered, based on the RFP from the client.

b) **Fees** for each of the services offered clearly identifying the amounts of the different fees and following, where possible the fee structure: fixed fees and fees per transaction. This is further developed in the section dedicated to 'Onboarding fees' and 'List of fees' below.

c) The main aspects of the CSP **risk assessment**, as further developed in the section dedicated to 'Risk assessment by CSPs' below.

d) List of documents set that constitute the **standard contractual terms** together with standard set of amendments applied by the CSP and any other contract term the CSP propose to include in the schedule or election sheet to accommodate for any specific risks or business considerations applicable to the prospective clearing client;

e) A list of accepted collateral and applicable haircuts;

f) A description of the requirements applicable for the **acceptance of orders** for clearing.

The information required under point (d) to (f) is further developed in the section dedicated to 'Standard Agreements and Contract Terms' below.

g) A description of the minimum **technological requirements**. This is further developed in the section dedicated to 'Technology' below.

86. ESMA envisages that the Proposal made by the CSP to the prospective clearing client should be an informed starting point for a discussion and negotiation between the CSP and the client. For this negotiation to be efficient and fair, the terms as described in the Proposal should be robust in the sense that the proposal needs to be clear and reliable.

87. For this reason, ESMA suggests that the terms and conditions in the Proposal should remain valid in its material terms. The material terms of the Proposal would be the fees charged by the CSP to provide the clearing services, the contract terms that are specific to the prospective client, hence not the standard terms and conditions and any other term agreed as material in the Proposal. The Proposal would be valid for a period of three months since the Proposal is delivered to the prospective clearing client. This time would allow clients to request and receive proposals from other CSPs before deciding with which they want to start an onboarding process. In addition, any deviations, of the non-binding terms in the Proposal, as a result of the negotiation process, should be justified and explained to the client and should respect the principles of fairness, reasonability, non-discrimination and transparency. In addition, ESMA propose that the binding terms may be changed as required by law, complemented with details (though not contradicting the binding terms) and changed where the prospective clearing client later in the negotiation provides documents contradicting the documents provided under the RFP.

6.3 Agreed terms

88. After finalising the negotiation, the Agreed Terms should be included in a document for the client where the specific terms and conditions are compared to the Proposal. This is to ensure that the Proposal provides a reasonable picture of the terms and condition applied by the CSPs and to ensure the Proposal and the subsequent Agreed Terms are indeed fair and reasonable.

89. The information in the Agreed Terms should be clear and easily understandable and structured in a way that helps the comparison and it should include the details on point (a) to (g) of the Proposal as presented in the section above 'Terms and conditions for providing clearing services'.

6.4 Example of a template for onboarding

90. ESMA has prepared an example of how the template to be used by the clearing client and the CSP during the process to set up clearing arrangements could look like. In addition, ESMA is considering issuing Guidelines on the use and preparation of such templates by CSPs if need be.

	A. Proposal	**B. Agreed Terms**
Part 1- RFP		
Relevant information on the prospective clearing client, i.e. the documents as listed in the onboarding framework by the CSP.	[information provided by clearing client]	N/A
Name and other identification aspects of the prospective clearing client.	[information provided by clearing client]	[information provided by clearing client]
The type of counterparty and sector the prospective clearing client belongs to.	[information provided by clearing client] NFC /FC Sector	[information provided by clearing client]
Type of transactions intended to clear subject to the clearing obligation.	[information provided by clearing client]	[information as agreed with the clearing client]
Type of transactions intended to clear not subject to the clearing obligation.	[information provided by clearing client]	[information as agreed with the clearing client]
Part 2- Onboarding		
A description of the process for onboarding.	[to be completed by the CSP]	N/A

An action list for onboarding, clearly listing the different steps the prospective clearing client will have to take within the onboarding process.	[to be completed by the CSP]	N/A
An action list for onboarding, clearly listing in detail the different documents to be provided by the prospective clearing client to the CSP, for example KYC documents, governance documents, annual reporting and other relevant documents.	[to be completed by the CSP]	N/A
The estimated timeline based on timings of visible steps from application to the prospective clearing client has completed the onboarding process and may use the services as covered by the contractual terms	[to be completed by the CSP]	N/A
The onboarding fees, where applicable	[to be completed by the CSP]	N/A
Part 3- Proposal		
The scope of the services offered based on the RFP.	[to be completed by the CSP]	[information as agreed with the clearing client]
The Proposal should list the fees based on the RFP[44];		
(i) the fixed fees and fees per transaction;	[to be completed by the CSP]	[information as agreed with the clearing client]
(ii) fees directly stemming from CCP paid or otherwise satisfied by the client;	[to be completed by the CSP]	[information as agreed with the clearing client]
(iii) other fees paid by the CSP to the CCP but passed on to the client (e.g. exchanges' fees) in	[to be completed by the CSP]	[information as agreed with the clearing client]

[44] Fees structure: Fees should be clear and easily understandable, and the client should be able to compare without difficulty the cost of the fees between Proposals from different CSPs.
Granularity: provide fees and prices for the different services separately, including the different cost for different levels of segregation protection.
Scope: clearly specify the services offered that are covered by the fees proposed to the client.

a joint sum or a sum divided by activity;		
(iv) discount policies and the conditions to access them; and	[to be completed by the CSP]	[information as agreed with the clearing client]
(v) interest rates policy regarding collateral posted.	[to be completed by the CSP]	[information as agreed with the clearing client]
The main aspects of the clearing service providers risk assessment;		
(a) credit strength, including any guarantees given;	[to be completed by the CSP]	[information as agreed with the clearing client]
(b) internal risk control systems;	[to be completed by the CSP]	[information as agreed with the clearing client]
(c) intended trading strategy;	[to be completed by the CSP]	[information as agreed with the clearing client]
(d) payment systems and arrangements that enable the prospective clearing client to ensure a timely transfer of assets or cash as margin, as required by the CSP in relation to the clearing services it provides;	[to be completed by the CSP]	[information as agreed with the clearing client]
(e) systems settings and access to information that helps the prospective clearing client to respect any maximum trading limit agreed with the clearing firm;	[to be completed by the CSP]	[information as agreed with the clearing client]
(f) any collateral provided to the CSP by the prospective clearing client;	[to be completed by the CSP]	[information as agreed with the clearing client]
(g) operational resources, including technological interfaces and connectivity;	[to be completed by the CSP]	[information as agreed with the clearing client]
(h) 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	[to be completed by the CSP]	[information as agreed with the clearing client]

money laundering activities.		
(i) the applicable margin model**;**	[to be completed by the CSP]	[information as agreed with the clearing client]
The list of documents to be negotiated containing all standard contractual terms relevant for different services;	[to be completed by the CSP]	[information as agreed with the clearing client]
A reference to the standard agreement (for example ISDA or FIA, including FIA model used).	[to be completed by the CSP]	[information as agreed with the clearing client]
The standardised general term of business, standard schedule or election sheet containing the set of amendments to the standard agreement the CSP apply to customise its business terms and offer.	[to be completed by the CSP]	[information as agreed with the clearing client]
Standardised appendices to reflect common terms' specifications related to the requirements for the markets and products covered by the clearing services agreement that the clearing client has expressed an interest in.	[to be completed by the CSP]	[information as agreed with the clearing client]
Any other contract terms the CSP propose to include in the schedule or election sheet to accommodate for any specific risks or business considerations applicable to the prospective clearing client.	[to be completed by the CSP]	[information as agreed with the clearing client]
A description of the requirements applicable to accept transactions to be cleared.	[to be completed by the CSP]	[information as agreed with the clearing client]
Accepted collateral and haircuts where applicable.	[to be completed by the CSP]	[information as agreed with the clearing client]

A description of the minimum technological requirements.	[to be completed by the CSP]	[information as agreed with the clearing client]

7 Risk assessment by CSPs

91. FRANDT contain the reference to the risk control criteria, hence, to ensure FRANDT compliant commercial terms the CSP shall ensure the risk control criteria applied by the clearing member or client related to the clearing services offered are FRANDT compliant. The risks that a CSP may assess includes counterparty risk but is not further specified under FRANDT. The risk control criteria applied shall be relevant, proportionate and justified and 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.

92. The initial proposal contained an approach with fairly detailed requirements and this proposal was subject to two diverging views. Some challenged the proposal as being too intrusive as the CSP has to be able to control its risk and detailed descriptions of risk assessments could limit the possibility to control the risk in offering of clearing services and could be contradictory to the requirements under Article 25 of RTS 6, MIFID II. Some other respondents instead, fully supported the proposal as clients seek to better understand the main aspects of how the CSPs undertake their risk assessments and for clients to identify the risk allocated to them.

93. It was noted an effective and efficient risk management is, of course, of paramount importance and institutions will always have to make a risk assessment before considering whether to offer or expand client clearing services and under what conditions they would be able to offer these services to new clients or continue to offer services to existing clients. The concern noted in the responses was that too prescriptive risk related requirements, such as the client classification criteria, could negatively impact the service providers' ability to correctly apply their risk management policies. One respondent noted that if the CSPs are of the view that they are unable to manage the risks associated with provision of clearing services, they may cease to provide these services, resulting in reduced access to clearing for EU market participants and risking an increased systemic risk in the clearing industry as the risks may be concentrated in an even smaller number of CSPs. ESMA agrees that CSPs should be able to control the risks related to the clearing services offered and the proposed principles on how to further specify FRANDT was not intended to hamper this ability.

94. ESMA notes that as an alternative one respondent suggests that any requirements based on internal risk policies should be clearly disclosed and explained to the clearing client in the process of bilateral negotiation and subsequently during the on-going relationship, and by ensuring this the duty for the CSPs to act fairly and reasonably is properly discharged. ESMA agrees that risk assessments may be efficiently managed in

the bilateral discussions but are concerned that the bilateral disclosure may be unclear and difficult to compare between CSPs.

95. ESMA notes that some clearing firms are obliged under Article 25 of EMIR RTS 6, to implement adequate, sufficiently conservative risk management policies. FRANDT requires the risk control criteria for the clearing member or client related to the clearing services offered to be FRANDT compliant. Based on this, ESMA included in the Proposal the risk control criteria based on the MiFID II requirements. To use the MiFID requirements as the basis to disclose the risk control criteria to the clearing clients would use a standardised approach that would take into consideration the FRANDT requirements to ensure the fairness, reasonableness and visibility of the risk control criteria used by the CSP for the clearing services offered but would not add new risk aspects to consider and disclose.

96. ESMA suggests requiring the CSPs to provide details in the Proposal on how the risk assessment, i.e. the risk control criteria based on MiFID requirements, is undertaken in relation to client onboarding and in relation to the ongoing risk assessments of the clearing client. As a result, a CSP not subject to the requirements under MiFID II shall still provide a risk assessment to the client and base such risk assessment on the risk components similar to MiFID II to ensure the risk assessment is presented in a way that is similar and comparable for clearing clients to understand how, and based on what, they are assessed. The information on the risk assessment shall contain enough details for the client to understand how any differences in prices charged are proportionate to costs, risks and benefits as this is one of the FRANDT requirements.

8 Fees

97. The initial proposal in ESMA's consultation paper was that CSPs should disclose ex-ante the range of different fees to be charged based on the 'client categorisation' or categories of clients designed by CSPs. The logic behind this system was to enhance transparency by:

    a) Providing clients with clarity on what range of prices to expect depending on their category by publicly disclosing ranges of prices ex-ante;

    b) Harmonising the way in which fees are presented, stating clearly the scope of the services covered by the fees and following a certain structure, when applicable: on-boarding fees and the list of fees (including fixed fees and fees per transaction);

    c) Making it easier for clients to compare prices across different CSPs in an efficient manner.

98. However, some respondents mentioned that publishing price ranges for categories of clients would not be useful because the actual price applicable for a client is only known after analysing each case, "Even disclosure of baseline fees may not portray a fair

representation of what a client would actually be charged once volume discounts and other commercial aspects have been taken into account".

99. After analysing the feedback received to the consultation paper, ESMA considers that the same objectives in terms of enhancing transparency should remain, however taking into consideration the reasoning stated above in relation to 'client categorisation'. Therefore, ESMA suggests requiring bilateral transparency on fees in addition to the public disclosure requirement under EMIR and MiFID II, but not to advocate for an ex-ante disclosure based on categories of clients in the final technical advice. Hence, fees should be included in the Proposal, after the prospective clearing client submits an RFP and the CSP has carefully assessed the client's profile.

100. Fees vary depending on several factors, including risk control criteria, trading strategy, the products cleared and the volumes to be cleared. In order to ensure transparency, CSPs should disclose in a detailed and harmonised manner 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 the Proposal. To facilitate the possibility to compare between different CSPs' Proposals and across classes of OTC derivative contracts, the Proposals from CSPs to clients should be as standardised as possible, easy to read and complete, i.e. cover the total cost of the clearing services offered. It should, where applicable, distinguish between fixed fees and transaction fees.

8.1 Onboarding fees

101. The onboarding fees, where applicable, should represent a one-off cost for the clearing client at the beginning of the relationship that can cover, for instance, the cost to plug the clearing client to the required IT infrastructure of the CSP, registration costs, costs of negotiating and agreeing on the relevant documentation, etc.

8.2 List of fees

8.2.1 Fixed Fees

102. Clearing has inherent high costs that are fixed for a clearing member, such as the clearing member fee, the contribution to the CCP default fund or system connectivity fees. In addition, CSPs often bear the costs of exchanges fees and other costs as the operational infrastructure or the staff needed.

103. 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. Such fixed fees should be presented to the client in the Proposal and should be clearly identified, 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, Individual Segregated Account and Gross Omnibus indirect clearing Account) and fees for collateral

management. Each field should clearly stipulate the type of fixed fees that have been included.

104. Some respondents noted that a CSP should not be allowed to require or pass though default fund contributions as this pass-through undermines the role of the clearing member as the risk carrier. It is further noted in the responses that today clearing clients are missing the right to make a claim against CSPs and challenge such payments, as this is often subject to limitations. Whilst ESMA agrees that fees passed through to the clearing clients could be a concern if such pass-through is not compliant with the FRANDT principles, it may however be difficult to provide standards to identify and allocate such costs. ESMA notes that CCP's already disclose some of its fees publicly[45] but not all costs can be easily derived and shared among the clearing clients.

105. ESMA concludes that the CSPs should clearly identify the fees charged by the CCP where they are directly related to the clearing service provided to the clearing client at hand. ESMA would also suggest that costs directly related to providing clearing services to the clearing client but not identified to a specific clearing client, should be noted as a separate fee containing the overall cost for the CSP to provide clearing services to clearing clients. ESMA agrees that the clearing client may compensate in a proportionate manner for the CSPs costs where they are directly linked to the provision of clearing services and that such fees should be clearly identified in the Proposal to the prospective client, separating between one type of fees containing the fees charged by the CCP and where directly related to the client and other type of fees charged by the CSP not directly linked to a client but directly linked to the CSP's provision of clearing services. This is to ensure the CSP is not shifting general costs of the provision of clearing services without providing the client with visibility of the different fees. The CSP shall ensure that the pass-through of fees as documented in the commercial terms are compliant with FRANDT.

8.2.2 Fees per transaction

106. Fees per transaction constitute the main category of fees according to the feedback received and such fees vary significantly depending on multiple factors, one of them being the negotiation process between the parties and other based on the volume and number of transactions cleared, the risk assessment and the management of collateral. Any fee per cleared transaction should be clearly disclosed in the Proposal prepared by the CSP.

8.3 Discount policies

107. The current public disclosure regime for example under Article 38 of EMIR, already requires CCPs and clearing members to provide information on discounts and rebates

[45] As part of EMIR disclosure requirements (Article 39). "CCPs and clearing members shall publicly disclose the levels of protection and the costs associated with the different levels of segregation that they provide […]".

applied in their fees. CSPs shall ensure they comply with such disclosure requirements. Any discount or rebate under FRANDT should be fair, reasonable, non-discriminatory and transparent. To base any discount or rebate on fair and reasonable objective criteria such as volume and risk parameters[46] would assist the clearing clients to understand how rebates are calculated and would ensure an equal application of such discount policies. Any discounts and rebates should be carefully designed not to create unbalanced pricing structures. Again, the CSPs shall note the overall requirements for conflict of interest to ensure any discount policies are FRANDT compliant.

9 Standard agreements and contract terms

9.1 Standard disclosure and agreement

108. Ensuring the commercial terms for providing clearing services are FRANDT compliant 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.

109. The initial proposal contained the requirement to publicly disclose general contractual terms, including the standard contract under which the CSP offers clearing services. The proposal further suggested that the contract should be clearly divided into sections to ensure a clearing client may be able to compare the different contracts and that the standard contract would include a separate schedule or annex for amendments, justifications or elections.

110. This proposal was met with two opposing views, however, the respondents challenging the proposal were though from time to time contradictory and possibly misunderstanding the proposal. The respondents challenging the proposal noted firstly the impossibility for a CSP to publicly share the standard documentation established by, for example, ISDA and FIA due to copyright restrictions. They further noted that there really was no standard and that all agreements are heavily negotiated and to rely on standard terms would likely hinder the effectiveness and reasonableness in the review process. Further, it was highlighted that detailed contract terms specifying prescriptive requirements and limitations on clearing service agreements would significantly reduce the ability of CSPs to appropriately manage the risks associated with provision of clearing services, thereby increasing the risk associated with clearing without increasing access to clearing. It was also noted that standard contractual terms change and are updated frequently, therefore, the disclosed standard documentation would likely give an incomplete and misleading impression of the documentation actually used.

[46] 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.

111. The respondents supporting the proposal to simplify and standardise the documentation process noted that there are standard documents to start from and nearly all clearing agreements are based on the ISDA/FIA modules and a shift to the same principles as under trading agreement i.e. using schedules or annexes to make amendments and supplementing terms would be very helpful. Therefore, the proposed structure inspired from trading frameworks to avoid the current long, bespoke and complex negotiations were welcomed. This set up would bring visibility on the changes and would simplify the review process and comparing different offers. Another advantage noted was the reduced negotiating times that could be significant in a default situation where replacements are considered.

112. It was however also mentioned that such model contracts mainly are drafted by entities within the banking sector and therefore do not take into account the specificity of certain clients such as the asset management clients. Some respondents also noted the requirements on the clearing clients to comply with other regulatory requirements under other legislations, such as the UCITS or AIFM directives are not considered and some CSP may apply conflicting requirements. ESMA would support that the CSP respects any other requirements applicable to the clearing client and avoids applying any conflicting obligations unless the requirement on the clearing client is derived from an obligation applicable to the CSP.

113. Based on above, ESMA would suggest to not require the CSPs to publish the market documents due to the restrictions on copywrite, neither to require the CSP to publicly disclose their standard agreements nor standard amendments in addition to the publication already required under current public disclosure requirements. CSPs should ensure that all key and material terms and conditions are publicly disclosed in accordance with current disclosure requirements under EMIR and MiFIR.

9.2 Structure of the agreement

114. It has been suggested in the responses that it would be more appropriate if the standard request form could set out the general commercial terms, together with a description of the contractual terms to be used rather than public disclosure. Responses also suggested that where the contractual terms are those produced by an industry body, as is generally the case in the cleared OTC derivatives market, cross reference to these terms together with a description of where the standardised terms are available should suffice.

115. There is clearly a need to improve the clarity and accessibility of the document set and contractual terms applicable where CSPs offers clearing services and ESMA finds the proposals interesting and has pursued with the Proposal as the main instrument to ensure disclosure rather than public disclosure. The Proposal, setting out the general commercial terms, would contain a description of the contractual terms to be used. Where the contractual terms are those produced by an industry body a cross reference to these standard agreements should be provided together with a description of the

standard terms and amendments the CSP usually applies and any additional terms and conditions applicable to the actual client requesting the Proposal. The Proposal would follow a standardised approach and cover the information as listed in 6.2 'Proposal'.

116. Providing this information in the Proposal would respect the limitation of the standardised agreements not being public and would not require the CSP to publish its commercial terms. However, ESMA would maintain the requirement for CSPs to structure their contract terms by using an annex or schedule to introduce the changes the CSP suggests to make to the market standardised agreements, i.e. to apply a similar approach as under the trading documentation. This would not limit the flexibility of the CSPs to apply its standard amendments to the market standardised documents neither would this approach restrict any additional amendments the CSP or the client would like to make to adjust agreements. The FRANDT requirements will be applicable once the delegated act enters into force, however, ESMA recognises that the formal requirements regarding format and shape of the agreement might need to be phased in hence ESMA suggests such requirements to only apply to new contracts. Existing contracts, for the provision of clearing services, will need to comply with FRANDT, hence be clear and easily understandable even if they do not follow the format and structure of the agreement as set out here.

9.3 Contractual terms

117. The initial proposal included a requirement that bespoke contract terms shall be reasonable and justified. This requirement was challenged due to being a subjective requirement. In the context of "unbiased and rational contractual arrangements". The word "justified", may be replaced with the word "relevant", as the aim is to ensure that the contractual requirements included in an agreement with a clearing client should be reasonable and relevant to comply with FRANDT.

118. Respondents noted that the delegated act should stipulate that clearing terms offered by CSPs should not contain terms that unnecessarily reduce clients' rights. In particular it is noted that clients should not be limited in their rights to make a claim against their CSPs for losses they incur should their CSP be declared in default and that clearing services terms should not contain an obligation on the client to indemnify CSPs for losses (often even including gross negligence) arising from the CSP's (clearing member) default. Another practical example provided in the responses is that CSPs apply one-sided terms in relation to representations and warranties and default provisions where for example "default" is often defined exclusively on the client's side and defined in the interest of the CSP. The absence of minimum notice periods for non-default terminations, to allow the clearing client to renegotiate clearing service agreement with another CSP, is also noted in the responses. Another example provided is the use of one-way liability clauses where the client remains liable and the CSP's liability is excluded wherever legally admissible. Finally, it is also noted that both clients and CSPs should have a balanced situation in terms of interest generated on the collateral posted, e.g. where the contractual terms establish that the client will bear negative interest rates, it should also

contemplate the situation where interest rates are positive for the client and therefore, the CSP should remunerate clients accordingly.

119. It is also noted that the terms and conditions of clearing services agreements greatly differ and are most likely designed for investment banking and not designed to cover for specific trading features such as physically settled commodity derivatives.

120. ESMA has noted the concerns raised in relation to applicable contract terms. The CSPs have the obligation to ensure that the commercial terms under which the clearing services are offered are FRANDT compliant, hence fair, reasonable and non-discriminatory. Unbalanced allocation of losses and costs, one-sided commercial terms and the applicability of terms not relevant for the clearing services offered seems to be less likely to be FRANDT compliant and where not FRANDT compliant they could be challenged by the clearing client as not being compliant with FRANDT and notified to the NCAs. ESMA believes that the measures introduced in the final advice will assist in ensuring that terms are compliant with the FRANDT requirements. ESMA notes that by using a standardised Proposal containing the key terms and conditions applied and the use of a schedule or annex for terms deviating from the standardised agreement used in the market, this would assist in ensuring visibility and simplify the review process to identify where for example one-sided terms apply and to ensure the terms applicable are suitable to the clearing client and compliant with FRANDT.

121. The initial proposal also contained a requirement to justify all terms deviating from EMIR, i.e. not linked to a requirement in EMIR. This was considered by respondents as too burdensome. ESMA agrees that the benefit of this provision compared to the cost of complying does not justify this requirement at this stage and this requirement has therefore been deleted from this final technical advice.

122. The initial proposal contained the requirement that the contract should not include local law requirements only as references to the local law but should replicate its content. This has been criticised by some respondents, raising a concern that the local law reference is unclear and that the extension of such replication is unlimited and law changes regularly. Considering those reservations ESMA agrees that the benefit of this provision compared to the cost of complying does not justify this requirement at this stage and this requirement has therefore been deleted from this final technical advice.

123. Some respondents requested that all collateral accepted by the CCP should be accepted by the CSP. The initial proposal did not contain any explicit requirements on this. ESMA may on one hand agree that it seems reasonable to ensure clients are not subject to additional limitations and that a wider pool of assets, not only cash, is accepted where possible. However, on the other hand there may be, for example, risk limitations at the CSP resulting in the additional limitation on accepted collateral at the CSP. Based on his, ESMA considers that the Proposal should contain all main terms and conditions including the acceptable collateral hence the CSP shall include the acceptable collateral applied by the CCP and the reasons for any limitations to this set of collateral by the CSP

and any applied haircuts. Any limitations not being fair, reasonable and non-discriminatory may be challenged as not being compliant with FRANDT.

124. It is also noted in the responses that CSPs retain the right not to accept orders even without providing a reason and respondents require that CSPs should be obliged to accept orders with a limited scope of qualifications and that the contractual options should be restricted for a clearing member not to accept an order, e.g. because of regulatory or exceptional risk management reasons. The initial proposal did not contain any explicit requirements on this. ESMA notes that whilst such a requirement would be helpful for the clients it should not be structured in way to obligate the CSP to enter into an agreement without assessing its risks etc. ESMA would however support the request that CSPs should be obliged to accept orders where certain conditions are fulfilled in order to give certainty. The Proposal and the Agreed Terms should therefore set out the terms and conditions for the acceptance of orders to ensure visibility for the client. One-sided optionality in accepting orders could be challenged as not compliant with FRANDT if considered being unfair, unreasonable or discriminatory.

9.4 Overlapping and duplicative terms

125. The initial proposal contained the requirement that agreements should not contain duplicative terms and should provide for a clear hierarchy in the applicable document suite. Respondents supported this approach noting that there often exists an unclear agreement structure where CSPs use too many layers of documents with overlapping provisions and complex hierarchies and this may lead to contradictory terms and confusion. This approach has though been criticised by some other respondents noting that in practice CCP terms do overlap with those included in client clearing agreements negotiated by the clearing firms. In addition, CCP terms are not usually included in documentation sets sent to clients, they are incorporated by reference as amended from time to time.

126. Assuming the terms of the CCP is only included as a reference and not part of the agreement with the clearing client such terms would not be considered duplicative as they would not apply. However, if they apply then to include binding contract terms by reference causes uncertainty and reduced visibility for the client. Hence, ESMA would require that it should be a clear order or hierarchy on the application of documents, its terms and other requirements and that duplicative terms or conflicting rules should be avoided as they may be challenged as not FRANDT compliant as not fair, reasonable and transparent.

9.5 Termination and changes to contract terms

127. One aspect considered in the initial advice is the termination provisions. The concern is the possibility for clearing clients to find a replacement clearing service within a certain required timeframe. It was noted in the consultation paper that CSPs are limited and as there is an obligation by law to clear certain contracts, a clearing client will have to find

a replacement CSP if its clearing services are terminated. Clients with a limited volume of clearing, may though struggle to find such a replacement CSP. To mitigate any unjustified difficulties by the clearing client the initial consultation paper suggested that a notice period should apply to the clearing clients and that such 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 CSP, to mitigate any cliff-edge effect. Hence, it was concluded that the notice period should be at least six-months where for example the termination was due to new regulatory requirements, relocation of clearing services or changes to the clearing services offered such as changes to the product range of services provided, implementing new technology requirements or changes to the collateral management process as part of its business consideration for its services. It was noted that the termination period could be shorter where the termination is 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.

128. Some respondents noted that where the proposal limits the CSPs ability to determine terminations and risk controls, this is contradictory to the principle of "no obligation to contract" which FRANDT is meant to be based on. Hence some respondents strongly disagreed with the proposal to impose a minimum six-month termination period and noted that it is imperative that CSPs can manage their CCP risks and to manage their risk as they deem appropriate and there should be no limitation to six-months' notice period or "freeze period" or if there is one, it has to be flexible enough to provide the possibility to deviate where needed. Such a termination period should not conflict EMIR risk assessment and if possible, should match the CCP termination period. One respondent noted that a six-months "stay" period would require a CSP to remain in the business for six-months even if just one client is left.

129. Other respondents particularly agreed with the standardisation and restrictions on termination and changes of commercial terms noting that CSPs usually have the right to exercise their unilateral discretion to suspend trading, to liquidate, to terminate or close-out clients' positions (not limited to default scenarios) to the disadvantage of clients. Therefore, there should be clear rules and obligations in respect to the suspension of trading and the closing out of clients' positions. This would avoid significant risks to the continuity of trades for the clearing clients. This is also linked to the aspect of conflict of interest at the CSP. The six-month period is also supported by respondents as a reasonable period as a shorter minimum notice period, combined with the difficulties of porting (particularly in a stressed period) could lead to trades being liquidated if an alternate clearing member is not found. One suggestion presented was to require the CSP to seek regulatory approvals for such measures.

130. ESMA considers the stability of contracts as essential and would support keeping the restrictions on suspension or termination of transactions to bring stability to the clearing client, however, ESMA also recognises that the CSP should have the ability to act to limit credit risks. To conclude, the proposal as set out on the initial proposal should in principle remain. Where a CSP will terminate its clearing contracts with a clearing client such

termination should be based on contractual terms being FRANDT compliant. Any contractual rights for CSPs to terminate or suspend the provision for clearing services should be carefully drafted to ensure they are fair, reasonable and non-discriminatory. The CSP should ensure transparency of contract terms and include them in the Proposal and in the Agreed Terms to ensure the clearing client has a clear understanding of when a CSP may terminate or suspend clearing services according to the Agreed Terms. ESMA would therefore require CSPs to apply at least a six-months' notice period unless in situations where a shorter termination period should apply primarily in relation to credit risk related assessments.

131. Another aspect considered in the initial advice were the changes to the commercial terms. For example, where clauses that allow for unilateral changes of terms are agreed within the contract, these may be considered biased and irrational, depending on the circumstances. Hence, all proposed changes should be reasonable, justified and applied equally (to the extent possible) to all clearing clients in a non-discriminatory manner.

132. Material or unexpected changes in the risk models applied by the CSP could translate into a disproportionate cost or even, again, an early termination for the clearing clients. For that reason, it was initially proposed that the models as applied at the time of onboarding should remain applicable and any changes to the models applied by the CSP with a material impact on clearing clients should be communicated well in advance and with the justification. Again, with the exception where a change to the contractual terms derives from the application of applicable law or the rules of the CCP.

133. The initial proposal was subject to divergent views. Respondents challenged the proposals as limiting the CSPs ability to determine risk controls and being contradictory to the principle of "no obligation to contract" which is a fundamental principle. Some respondents noted that the possibility to unilaterally change the contract terms was agreed to in the negotiation and therefore part of the agreed contract terms whilst other noted that unilateral changes should be limited to where linked to a CCPs requirement etc. Some respondents generally agreed with the approach and in particular in relation to the standardisation and limitations of changes to commercial terms.

134. ESMA agrees that requirements on the CSPs to act as a CSP to a clearing client on the same terms is an obligation on a CSP that is both burdensome and possible open to challenge based on the CSPs obligation to manage risk, hence such obligation has to be carefully considered. The CSPs' right to manage risks for example under Article 25 (RTS 6, MIFID II) should not be limited and the CSP should not have material unbalanced risks towards the CCP and towards its clients due to "freeze-periods". ESMA however also notes the fundamental problems that lays with uncertainty on accessibility to clearing and "fixed" terms under which the service is provided is crucial in ensuring a stable and reliable access to clearing. Hence, it is important to ensure stability and certainty of the clearing clients. Based on this ESMA would require that changes to clearing contract are carefully considered and unilateral changes should respect the FRANDT principles and be applied in a fair and reasonable and manner. Hence, a clause

that allows for general unilateral changes, might be challenged as unproportionate, unfair, unreasonable and/or discriminatory.

10 Technology

135. The initial proposal noted that as a starting point technological requirement should not, where possible, represent a barrier to access clearing or result in biased and irrational contractual terms. It is further noted that CCPs shall publicly disclose the operational and technical specifications in accordance with Article 38[47] of EMIR.

136. The proposal on technology requirements was subject to divergent views. Some respondents challenged the reference of IT requirement as a barrier to access noting that CSPs do not have an interest in deliberately using IT as an inhibition nor are they aware of any specific technology requirements that are problematic or that needs to be addressed. Another reflection was that as long as the CSPs inform the prospective client about the IT requirements there is no need to submit IT structures to the FRANDT requirement and it is also noted by a respondent that CSPs should not be required to implement manual processes, or scale down their IT systems only to satisfy individual clients. It was also noted that where CSPs specify particular technological requirements, this is typically a reflection of the operational and technical specifications imposed on them by the CCP or industry standard workflows, such as affirmation platforms. Another response noted that providing streamlined and focused technology solutions to clients is all part of a clearing firm's competitive offering, and that it is often clients that make technology demands of CSPs, for example asking if a certain data feed can be linked to the client's systems.

137. Other responses welcomed the proposal by ESMA noting that the individual technology solutions used by CSPs (and CCPs) often forces clearing clients to implement burdensome and costly manual processing or self-developed IT-solutions in order to cope with the reconciliation of data, with the different data formats provided by CSPs and CCPs, and regulatory obligations like EMIR reporting. The respondent noted that the non-harmonisation and low quality of used technology and data format cause recurring problems and high costs for clients to collect, reconcile and maintain data. Where CSPs offer individual technology for reconciliation these are based on their own systems and do not allow an efficient and independent reconciliation process on the client side. A more harmonised and standardised approach to technologies and data formats would be very good and reduce operational risk in the view of some respondents.

[47] 4. A CCP shall publicly disclose the operational and technical requirements relating to the communication protocols covering content and message formats it uses to interact with third parties, including the operational and technical requirements referred to in Article 7

138. It was suggested by a respondent that the CSPs can outline the basic technology requirements though the RFP term sheet or schedule, in order to give prospective clients a preliminary understanding of the IT setup which they are operating.

139. ESMA notes that any commercial terms applied by the CSP should be FRANDT compliant. ESMA further notes the opposing views on who should bear the cost of non-harmonised systems. Considering the different views presented, ESMA has adjusted its proposal. ESMA would suggest to encourage the CSPs to create harmonised technology and data format simplifying the access for clients to different CSPs and reducing the current high costs for clients to collect, reconcile and maintain data. More harmonised and standardised technologies and data formats would allow clients a smoother and automated operation and by this way reduce operational risks considerably. However, such harmonisation in the market may be better achieved by a market led initiative.

140. In addition, considering the overall reluctance to publicly disclose information but noting the aim to generally increase transparency and noting the existing requirements under EMIR[48] where a CCP is required to publicly disclose the operational and technical specifications requested from clearing members, ESMA suggests that operational and technological requirements requested by CSPs should be clearly stated in the Proposal noting that this would help clients to compare the offers of the different CSPs and help clients to check their capabilities for meeting those requirements.

11 Enforcement of FRANDT requirements

141. Some respondents have requested further information on how FRANDT will be enforced. One respondent noted that a market standard document reflecting the standardisation of the commercial terms would facilitate the claim of the counterparties rights but would welcome guidance on how a counterparty should proceed where doubt exists on the fulfilment of the FRANDT regime by CSPs.

142. To consider the enforcement of FRANDT is not part of ESMAs mandate but ESMA notes that Article 12 of EMIR refers to the penalties and to the obligation of member states to lay down the rules on penalties applicable to infringements of the rules under Title II referred to clearing, reporting and risk mitigation techniques. Therefore, it is the duty of the member states to set up a supervisory and enforcement system that covers the compliance with FRANDT requirements. Furthermore, EMIR established the obligation to disclose any penalty imposed for infringements of certain provisions, including Article 4 of EMIR on clearing and hence, FRANDT requirements. ESMA also acknowledges that the adjustment of the penalties regime under EMIR to incorporate FRANDT

[48] Art 38(4) A CCP shall publicly disclose the operational and technical requirements relating to the communication protocols covering content and message formats it uses to interact with third parties, including the operational and technical requirements referred to in Article 7.

enforcement provisions can require some preparation and that the Commission might have to take this into account when preparing the delegated act.

12 Annexes

12.1 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, REASONABELE, 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[49]) as amended by EMIR REFIT[50] (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 prejudge 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"),[51] and the Framework Agreement on Relations between the European Parliament and the European Commission (the "Framework Agreement")[52].

According to Article 4(3a) of the Regulation as amended, the Commission is empowered to adopt a delegated act to specify, 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,[53] the Commission will continue, as appropriate, to consult experts appointed by

[49] 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.
[50] 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.
[51] Communication of 9.12.2009. COM (2009) 673 final.
[52] OJ L 304, 20.11.2010, p. 47.
[53] Commission's Decision of 6.6.2001 establishing the European Securities Committee, OJ L 191, 17.7.2001, p. 45.

the Member States in the preparation of possible delegated acts in the financial services area.

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")[54], 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

[54] 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.

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 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 prejudge 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[55]. The delegated act should be in place well before then, to allow clearing members and clients that provide clearing services

[55] See point (c) of Article 2(2) of the amending Regulation.

appropriate time to ensure that their commercial terms comply with the new obligation. It is therefore of outmost 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.

12.2 Annex II Cost-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) of EMIR are to be considered FRANDT. The mandate is enclosed in Annex I.

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 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:

- The main policy decisions have already been taken under EMIR and the impact of such policy decisions have already been analysed and published by the Commission[56];
- ESMA does not have the power to deviate from its specific mandate provided by the Commission.
- ESMA's mandate is to propose the most adequate provisions on how to specify the conditions under which the commercial terms are to be considered to be compliant with the 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

[56]Impact assessment, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017SC0148

ESMA has been mandated to develop and submit to the Commission a technical advice on 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 has assessed various approaches considering different levels of disclosure and standardisation, to contribute on one hand, to an increased and facilitated access to central clearing on FRANDT compliant terms and on the other hand, to ensure the new requirements would not be too cumbersome or far reaching for the CSPs to comply with. The conditions and requirements defining FRANDT commercial terms span over a wide range of considerations and are a combination of legal, operational, risk and technological components.

ESMA launched a consultation in October 2019 with responses back by December 2019. In the consultation paper ESMA proposed requirements on CSPs in providing clearing services to ensure such clearing services are provided on FRANDT compliant commercial terms.

The responses either supported Option 1 or Option 2.

Policy option 1: *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.*

Policy option 2: *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, adresses the process of onboarding clearing clients and encoraging further standardisation of contractual terms.*

Respondent supporting Option 1 noted that any additional rules adds very little in substance to the requirement under EMIR Refit hence no need to take further action, but if ESMA produces additional requirements to specify FRANDT then this respondent supports Option 1, i.e. to establish limited conditions with requirements under which commercial terms are to be considered, merely supplementing the current framework. One of the respondents supporting Option 2 noted that Option 2 should be the *de minimis approach*.

The main comments are presented below.

1. The question asked is if the initial concern, regarding access to clearing services for counterparties with a limited volume of activity in the OTC derivatives market, remains after considering other recent changes that have been introduced i.e. through EMIR Refit and the exemption from the clearing obligation for certain counterparties. It should be investigated if the cost to implement additional rules under FRANDT is still relevant.

2. The Option 2 is challenged on the basis that the cost benefit analysis does not accurately reflect the costs for clearing service providers. The assumption that option

2 simply codifies existing market practices and therefore expects that the costs for clearing service providers should be similar or only slightly higher than at present is not correct. It is noted that the cost benefit analysis for Option 2 underestimates the true cost of the proposals as FRANDT requirements would amount to a substantial change from existing market practice as it is noted that client classifications are not currently used, nor are standard clearing contracts.

3. These additional requirements proposed on CSPs would have limited benefits to clients and are likely to lead to an increase costs to clients as well as a reduction in the number of CSPs, resulting in a concentration of risk in fewer CSPs, creating systemic risk.

In considering the responses to the consultation paper ESMA has made certain changes to the initial proposal as outlined in the technical advice. The main changes are that the final technical advice does not contain clearing client categorisation, some requirements on the terms and conditions has been removed and requirements for public disclosure has been significantly scaled back.

3. Policy Options

Considering that the mandate to ESMA form 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 in the consultation paper. Considering the responses to the consultation paper ESMA has reconsidered the level of requirements to specify FRANDT.

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.

ESMA also notes that depending on interpretation of the scope of application of FRANDT there will be different impacts on the cost and benefit analysis. On one hand, if a limited scope of FRANDT applies this may result in costs for the clearing client as duplicative systems may be required to be used, FRANDT and not-FRANDT, and the costs applied by the CSP may be high if not shared among many clearing clients. On the other hand, if FRANDT applies also to all transactions or all transactions voluntarily cleared, this would lead to a higher number benefiting from FRANDT and a wider client base to share costs applied by the CSP to comply with FRANDT. Hence the cost and benefit analysis should bear the scope of FRANDT in mind.

Specific objective	Facilitate and increase 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) to ensure the clearing services are provided under FRANDT compliant commercial terms.

Policy option 1	To establish limited 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 very limited added value, any increase in access to clearing would probably be the result of all actions taken recently, however the issues identified on client terms and access requirements, would not be addressed. Another draw-back with this limited approach is that the FRANDT requirements on CSPs will be applied in different manners between CSPs and this may result in the CSP taking the least actions becomes the cheapest and hence there is probably an interest in adopting FRANDT to the bare minimum. Another sign that this might be the case is that some respondents noted that they had no understanding for why some clients were struggling with unfair terms and limited access to clearing. Unless FRANDT is specified through legal requirements, such actions to support access to clearing and minimise unfair terms will not very likely not be taken.
Policy option 2	To establish FRANDT using a principle-based approach containing both applied principles and some legal requirements. By building on the existing requirements under EMIR and using this as the base for public disclosure the CSPs will minimise any unreasonable additional costs. Where specific requirements are recommended, they are carefully designed to address concerns such as facilitating comparability of the information disclosed, addressing the process of onboarding clearing clients, standardising the information disclosed to clients bilaterally when making a proposal of services and encouraging further standardisation of contractual terms.
How would this option achieve the objective?	This option would build on the existing EMIR requirements though introducing elements of improved transparency, harmonisation and standardisation. This option would introduce some requirements with clear intention to tackle identified problems, such as: long and cumbersome document negotiations, unbalanced contract terms, unclear processes for accessing clearing services and a lack of clarity that reduces both visibility of contract terms and reduces possibility to compare different CSPs. This option will contain some costs but mostly in relation to simplifying the contract terms (however there are market standard documents developed) and establishing a harmonised on-boarding process as both are new processes. To

	ensure contract terms are fair and reasonable and to improve disclosure, primarily bilateral, would be less of a cost for CSPs. The requirements should not be too cumbersome to risk CSPs not being able to establish a viable clearing service business.
Policy option 3	To specify the principle based approach with conditions to be considered FRANDT such as establishing prescriptive format of disclosure, public disclosure of standardised contractual and commercial terms for providing clearing services, the use of a client categorisation, unifying the use of risk parameters, technological requirements and requirements on 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 transparency and comparability of commercial terms but could have unintended consequences making the process of onboarding and providing clearing services disproportionately burdensome for the CSP. Also, it could risk disclosing business sensitive information that could have a negative impact, e.g. be detrimental for competition purposes.
Which policy option is the preferred one?	Policy Option 1 does not introduce added value to the EMIR framework, where disclosure and FRANDT are already requirements applied to CSPs. Option 3 would risk a potentially burdensome process that could have a negative impact on the freedom to contract and result in less access to clearing if envisaged by CSPs as too burdensome, prescriptive, unproportionate and too intrusive in the offering of clearing services particularly in relation to risks assessments. 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. It achives a balance between the objective of contributing to an increase in access to clearing on FRANDT compliant commercial terms and being too granular and prescriptive and therefore possibly reducing the access to clearing or making such services too expensive. Option 2 is also allows for standardisation in the information disclosed without compromising confidentiality.
Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs	ESMA is only providing a technical advice to the Commission which has the responsibility to decide which option to choose for its Delegated Act.

to be informed or consulted?	

Impacts of the proposed policies:	
Policy option 1	
Benefits	The benefits of this option would be limited as mainly relying on the regulatory framework of EMIR which already mandates transparency requirements and FRANDT as stipulated in the regulation.
Regulator's costs	Regulators would bear similar costs than today and should supervise compliance with FRANDT and current transparency conditions, however the supervisory work would have a limited impact in facilitating access to central clearing.
Compliance costs	The costs for CSPs will be similar to the costs of CSPs today and probably would not contribute to further facilitate access to central clearing. This option would though have a high costs for clearing clients by either not accessing the cleared market or by accessing the cleared market at a high costs including costly negotiation processes and one-sided terms leaving the clients to pick up the costs for harmonisation of information, technology and risks.
Policy option 2	
Benefits	It would ensure a certain level of granularity in the information to be disclosed publicly based on the already existing requirements and would allow clients a better visibility on the process for onboarding to enhance trust between the parties based on the RFP, the subsequent Proposal and the Agreed Terms. This would lead to increased and standardised disclosure of information on bilateral basis between the clearing client and CSPs, while leaving room for market competition and freedom to contract and overall, 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 now FRANDT requirements. However, the standardised approach on disclosure and the standardisation of contractual terms would facilitate supervisory activity. As part of EMIR

	ongoing supervisory activity, NCAs could access onboarding documentation upon request.
Compliance costs	The costs for CSPs would be slightly higher, and in some cases higher, than the costs of today to provide clearing services as FRANDT introduces harmonisation requirements both in relation to disclosure, onboarding and commercial terms. There may be a cost adjusting onboarding to a more standardised process using a harmonised template in the process. Also using standardised contract terms with changes market in an annex or schedule may also add costs depending on how many changes would need to be moved into a schedule rather than changing in the contract terms directly. CSPs would keep their own practices and only adapt 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 and in any case, adjusting costs would be a one-off. The cost of the clearing client will probably decrease as the negotiation and access processes would be less expensive and arguably the cleared prices are lower due to liquidity and established processes with CCPs as the central risk. The increase in transparency will also reduce costs as clearing clients would be able to compare costs and fees in a more efficient manner.The clearing cleints costs of fixed fees may though be higher as CSPs will increase some costs to cater for their costs in implementing FRANDT.
Policy option 3	
Benefits	It will ensure a high degree of public disclosure and comparability across offerings of clearing services and will provide certain rights for the clearing clients when being offered clearing services.
Regulator's costs	The costs for regulators could be lower depending on if such more prescriptive requirements would arguably be 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 CSPs will be higher with this option because CSPs would have to change the way in which they are offering clearing services and would have to adapt their processes as it is understood that Option 3 less codifies practices than initially thought. The cost of the clearing client will probably decrease as the negotiation and access processes would be less expensive and arguably the cleared prices are lower due to liquidity and established processes with CCPs

	as the central risk. The increase in transparency will also reduce costs as clearing clients would be able to compare costs and fees in a more efficient manner.The clearing cleints costs of fixed fees may though be higher as CSPs will increase some costs to cater for their costs in implementing FRANDT.

12.3 Annex III Illustrative technical advice to specify FRANDT

This illustrative technical advice should be read as a mere illustration of how the FRANDT conditions as specified in this report could look like when translated into a Delegated Act. It is not suggested as a legal text and it is noted that the principles and requirements established in the technical advice may be translated into a legal text in many different ways, and the below is just one way to illustrate such requirements.

Definitions

Clearing services providers refers to clearing members and clients which provide clearing services under Article 4(3a) of EMIR.

Article 1

Components of FRANDT

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

(a) the transparency through disclosure requirements;

(b) the onboarding framework describing the process to become a client of a clearing services provider;

(c) the risk control criteria;

(d) the fees structure;

(e) the contractual terms; and

(f) the technological requirements.

Article 2

Public disclosure

1. A clearing service provider shall comply with the requirements for transparency and for public disclosure, as set out Regulation (EU) 648/2012, and Commission Delegated Regulation 2017/589 and Commission Delegated Regulation 149/2013 on indirect clearing when providing clearing services.

2. A clearing service provider shall publicly disclose and clearly display on its website a summary of the onboarding framework, referred to in Article 3, including the following:

(a) a general description of the process for onboarding a client to provide visibility on the onboarding process allowing prospective clearing clients to assess the different steps to undertake;

(b) the key commercial terms including the prices and fees associated with the services provided in accordance with Article 38 of EMIR and the conditions under which services are provided in accordance with Article 27 of the Commission Delegated Regulation 2017/589 and Articles 2(1) and 4(1) of the Commission Delegated Regulation 149/2013; and

(c) a template for the request for proposal in accordance with Article 3(2).

Article 3

Onboarding process and documentation

1. The onboarding process contains three steps, the request for proposal submitted by a prospective clearing client, the proposal provided in response to the request for proposal by a clearing service provider and the agreed terms reflecting the signed agreements.

2. The request for proposal should be standardised and be in the form of a schedule. It shall be completed by a prospective clearing client and shall include:

(a) information on the prospective clearing client specifying the legal name, the type of counterparty and the sector of activity;

(b) information on the documents necessary to be provided by the prospective clearing client, including governance documents and annual reporting; and

(c) type of transactions the prospective clearing client intends to clear specifying separately where subject to the clearing obligation and where not subject to the clearing obligation.

3. As part of the onboarding process, a clearing service provider shall assess the prospective clearing client against the risk control criteria as referred to in Article 5.

4. Where a clearing services provider considers to provide a prospective clearing client with clearing services, it shall respond to the request for proposal with a proposal for the provision of clearing services. The proposal shall contain:

(a) a detailed description of the process for onboarding, including;

(i) an action list for onboarding, clearly listing the different steps the prospective clearing client will have to take for the purposes of the onboarding process;

(ii) a list specifying in detail the documents necessary to be provided by the prospective clearing client to the clearing service provider in addition to the

documents provided under the request for proposal, including; financial statements, KYC documents, governance documents and annual reporting documents; and

(iii) the estimated timeline to complete the onboarding process based on timings of steps in (i) of this paragraph. The timeline shall contain the time allocated to the clearing service provider and the prospective clearing client to provide documents or answer questions in the process of onboarding and any delay in the steps will result in a longer onboarding process.

(b) the scope of the services offered by the clearing service provider based on the request for proposal;

(c) onboarding fees setting out the fees for onboarding and registration where applicable and the list of fees containing the different fees for the services offered by the clearing service provider based on the request for proposal as further specified in Article 4;

(d) the main aspects of the clearing service provider's risk assessment using the risk control criteria as required by Article 5;

(e) the document set relevant for the different services as specified in the request for proposal containing the reference to the standard contractual terms, standard deviations to the standard contractual terms applied by a clearing service provider and the specific contractual terms for the prospective clearing client, as further specified in Article 6;

(f) the main requirements for transactions to be accepted for clearing as further specified in Article 8;

(g) the collateral accepted as further specified in Article 8; and

(h) the minimum technological requirements applicable as required by Article 7.

5. A clearing service provider shall carefully design any procedural steps and different deadlines for deliveries to ensure they are fair and reasonable and shall ensure that the onboarding process is not subject to unjustified and unproportionate onboarding requirements.

6. The proposal made by the clearing service provider to the prospective clearing client shall be reliable, valid and binding in its material terms. The material terms of the proposal shall be valid and binding for a period of three months from the date the proposal is delivered to the prospective clearing client. The material terms shall include;

(a) the fees charged by the clearing service provider to provide the clearing services;

(b) the contract terms that are specific to the prospective clearing client; and

(c) any other term defined as material term in the proposal.

Any deviations of the non-material terms in the proposal, shall be justified and explained to the prospective clearing client and should respect the principles of fairness, reasonability, non-discrimination and transparency. The binding terms may be changed as required by law, complemented with details (though not contradicting the binding terms) or changed due to conflicting information received after the request for proposal.

7. The agreed terms, between the clearing service provider and the clearing client, shall be presented to the clearing client in a clear and easily understandable manner. The agreed terms should include information comparing the agreed terms with the terms and conditions of the proposal.

8. A clearing service provider shall submit, upon request of a national competent authority, copies of request for proposal, the proposal and the agreed terms.

Article 4

Onboarding fees and list of fees

1. A clearing service provider shall disclose in the proposal made to a prospective clearing client the total set of fees for providing the clearing services as requested by such clearing client.

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

3. A clearing service provider shall determine the price structure that best suits their business model identifying, where applicable, the following types of fees;

(a) Onboarding fees which shall be the one-off cost for the clearing client payable at the beginning of the relationship with the clearing service provider. The onboarding fees may include 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 clearing client.

(b) Fixed fees, which shall be the fees that are payable periodically by the clearing client and may include:

(i) annual fixed fees or minimum revenue fees;

(ii) fees to cover ongoing 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)); and

(iv) fees for collateral management and transformation.

(c) Transaction fees, which shall be the fees for clearing transactions, separated by asset class, as requested by the prospective clearing client and any other transactional based fees, including margins and collateral management.

4. Where a clearing service provider applies discount and rebate policies, the conditions for benefitting from such discount and rebate policies shall be included in the proposal in a manner that is clear and easily readable and allow clearing clients to understand how discount policies are calculated. Discount and rebate policies shall be based on objective criteria including volumes and clearing patterns.

5. A clearing service provider shall only allocate its costs that directly relate to the provision of clearing services to the clearing client and such costs shall be separated into either fees directly linked to fees charged or payments required by the CCP or fees linked to the provision of clearing services distributed to clearing clients on an average basis.

6. A clearing service provider shall submit, upon request by the competent authority, a yearly ex-post disclosure of the fees charged to its clearing clients. Such disclosure shall be granular and segregated by the type of fees contained in the proposal and separated by clearing client, asset class and per type of transaction on an average basis. This information shall be easily comparable to the fees published by the clearing service provider.

Article 5

Risk control criteria

1. A clearing service provider shall disclose in the proposal the key information on how it undertakes its risk assessment of the clearing client in accordance with the requirements under Article 25 of the Commission Delegated Regulation (EU) 2017/589. The proposal shall contain information on:

(a) the risk control criteria considered and applied to assess the risk profile of the client; and

(b) how and for which purpose the risk assessment based on the risk control criteria is undertaken both in relation to client onboarding and in relation to the ongoing risk assessments of the client.

2. The information on the risk assessment shall contain enough details for the client to understand how prices are charged, changes apply and why there may be differences to

published fee schedules, to ensure the prices charged are proportionate to the clearing client's costs, risks and benefits.

3. A clearing service provider shall communicate any material changes in the risk control criteria to a clearing client in advance of the change applying detailing the key reasons for the change.

Article 6

Contract terms

1. A clearing service provider shall provide in the proposal a list of the contracts relevant for the clearing service requested by the clearing client.

2. A clearing service provider shall provide a reference to the market standard agreement used by the clearing service provider together with instructions on how to access it. The market standard agreement may be complemented by an annex, such as a schedule or an election sheet to cater for amendments, elections or additions to the standard agreement were justified by credit risk, regulatory requirements, market practices or other business requirements. The election annexes may include pre-defined sets of elections but may also contain contract terms only relevant to the clearing client, however such additional material contract terms shall be reasonable and relevant.

3. A clearing service provider shall provide all proposed standard contractual terms and client specific contractual terms relevant to the requested services, including:

(a) the standardised general term of business the clearing service provider applies specified in an annex to the standard agreement;

(b) the client driven terms including all amendments the clearing services provider proposes to include in the annex to accommodate for any specific risks or business considerations applicable to the clearing client; and

(c) the standardised appendices to reflect the common terms specifications related to the requirements related to the markets and products covered by the clearing services that the clearing client has expressed an interest in.

4. The provisions under the standard agreement and in the annexes should avoid, to the extent possible, resulting in provisions that are overlapping and/or contradictory.

5. Contractual terms shall not include a termination notice period shorter than 6 months unless such period is reasonable and justified.

6. Any material changes to the contract terms shall be communicated (where possible) with sufficient notice period and with the justification for the change clearly provided. Changes to the agreed contract terms shall be fair, reasonable and justified. Any provision in the contract

terms allowing unilateral changes that may have a material impact might be challenged as non-compliant with the principles of fair, reasonable, non-discriminatory and transparent.

Article 7

Technological requirements

1. A clearing service provider shall specify in the proposal made to the clearing client the operational and technological requirements requested by the clearing service provider to onboard the clearing client and to provide clearing services to the client.

2. A clearing service provider shall, to the extent possible, provide clearing services using technology suitable to the type of clearing services offered and use harmonised data format for clients to collect, reconcile and maintain data.

Article 8

Requirements on clearing service providers

1. A clearing service provider shall agree with the clearing client on the criteria for the clearing service provider to accept transactions for clearing from the clearing client and the clearing service provider shall accept transactions for clearing if they comply with such criteria agreed between the parties.

2. A clearing service provider shall accept the same collateral as the CCP would accept for the relevant transaction unless otherwise agreed with the clearing client.

3. A clearing service provider shall respect any other requirements applicable to the clearing client and avoid applying obligations that might conflict with sectorial obligations applicable to the clearing client, unless such request is derived from an obligation applicable to the clearing service provider.

12.4 Annex IV – Advice of the Securities and Markets Stakeholder Group

In accordance with Article 10(1) and Article 37(1) of the ESMA Regulation, ESMA has requested the advice of the Securities and Markets Stakeholder Group (SMSG). The SMSG has not provided any comments.