

PUBLIC STATEMENT

Implementation of the FRANDT commercial terms to provide clearing services

The European Securities and Markets Authority (ESMA) has been recently made aware of challenges that certain clearing members and clients are facing when preparing for the 18 June 2021 deadline to provide clearing services in accordance with FRANDT commercial terms.

Under EMIR, clearing members and clients are required to provide clearing services, whether directly or indirectly, under fair, reasonable, non-discriminatory and transparent (FRANDT) commercial terms from 18 June 2021.

As empowered by Article 4(3a) of EMIR, the Commission has adopted a delegated regulation specifying the conditions under which the commercial terms are to be considered to be FRANDT (the Delegated Regulation) on 2 June 2021. This Delegated Regulation is now subject to the scrutiny of the European Parliament and Council and it will only be published in the Official Journal and enter into force following the completion of this process.

Given that the scrutiny period is ongoing, it cannot be known when the Delegated Regulation will be finalised and start to apply but this will likely occur after 18 June 2021. There could therefore be a timing gap during which clearing members and clients would need to provide clearing services in accordance with FRANDT commercial terms while the Delegated Regulation specifying the conditions under which the commercial terms are to be considered to be FRANDT has not entered into force yet.

From a legal perspective, neither ESMA nor competent authorities possess any formal power to dis-apply a directly applicable EU legal rule or delay the start of some of the related obligations. Therefore, any change to the application of the EU rules would need to be implemented through EU legislative process.

In view of the above, ESMA encourages market participants to anticipate and get ready to comply with the upcoming regulatory obligations set out in Article 4(3a) of EMIR. At the same time, ESMA acknowledges the challenges that certain clearing members and clients may face



to prepare and provide clearing services in accordance with FRANDT commercial terms before the Delegated Regulation has entered into force. In this respect, ESMA expects competent authorities not to prioritise their supervisory actions towards clearing members and clients expected to provide clearing services in accordance with FRANDT commercial terms before the date the Delegated Regulation will apply, and to generally carry out their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner.