Council of the
European Union

Brussels, 3 June 2021
(OR. en)

9461/21

EF 187
ECOFIN 569
DELACT 115

COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	C(2021) 3817 final
Subject:	COMMISSION DELEGATED REGULATION (EU) …/... of 2.6.2021 supplementing Regulation (EU) No 648/2012 by specifying the conditions under which the commercial terms for clearing services for OTC derivatives are to be considered to be fair, reasonable, non-discriminatory and transparent

Delegations will find attached document C(2021) 3817 final.

Encl.: C(2021) 3817 final

EUROPEAN
COMMISSION

Brussels, 2.6.2021
C(2021) 3817 final

COMMISSION DELEGATED REGULATION (EU) …/...

of 2.6.2021

supplementing Regulation (EU) No 648/2012 by specifying the conditions under which the commercial terms for clearing services for OTC derivatives are to be considered to be fair, reasonable, non-discriminatory and transparent

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories[1] ('EMIR') was amended by Regulation (EU) 2019/834 on 20 May 2019 ('EMIR Refit')[2].

EMIR Refit introduced an obligation on clearing members and clients providing clearing services, whether directly or indirectly, ('clearing service providers') to provide those services under fair, reasonable, non-discriminatory and transparent ('FRANDT') commercial terms[3]. The aim is to help counterparties to get access to clearing services, especially those that have a limited volume of activity in the OTC derivatives market and face difficulties in accessing central clearing, whether as a client of a clearing member or through indirect clearing arrangements. Requirements to apply FRANDT terms should not result in price regulation or an obligation to contract, and clearing service providers should be able to control the risk related to the clearing services offered, such as counterparty risks[4]. The requirement to apply FRANDT terms will apply from 18 June 2021[5].

EMIR Refit empowers[6] the Commission to adopt a delegated act specifying the conditions under which commercial terms for clearing services of clearing service providers are to be considered to be FRANDT 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.

The delegated act is to be adopted in accordance with Article 82 of EMIR and Article 290 of the Treaty on the Functioning of the European Union.

---

1 OJ L 201, 27.7.2012, p. 1.

2 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).

3 Article 4(3a) of EMIR as amended.

4 See recital 11 of EMIR Refit.

5 Article point (c) of Article 2(2) of EMIR Refit.

6 Third subparagraph of Article 4(3a) of EMIR as amended.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Procedural aspects

On 26 June 2019, the Commission asked the European Securities and Markets Authority (ESMA) for its views ('technical advice') on a Commission delegated act specifying the conditions under which commercial terms for clearing services of clearing service providers are to be considered to be FRANDT, to be adopted under Article 4(3a), third subparagraph, of EMIR.

ESMA conducted a public consultation on a draft technical advice between 3 October and 2 December 2019. ESMA received 19 responses, of which three are confidential. The non-confidential responses are published on ESMA's website[7]. ESMA adopted its final technical advice 2 June 2020.

Between 26 October and 9 November 2020, the Commission conducted a written consultation of the Expert Group of the European Securities Committee ('EGESC') on the provisional content of this delegated act. The Commission received eight responses from Member States.

Between 10 March and 7 April 2021, the draft delegated act was published for public feedback. The Commission received feedback from 13 stakeholders.

Stakeholder views

Stakeholders generally supported the underlying aim of the requirement to apply FRANDT terms, i.e. to improve access to clearing of OTC derivatives. However, with respect to the conditions under which commercial terms should be considered to meet the conditions for FRANDT, stakeholders can be divided into two groups.

On the one hand, stakeholders in one group (mainly represented by clients) generally supported a delegated act with comprehensive and detailed requirements to ensure a harmonised application of rules across clearing service providers especially to smaller clients. On the other hand, some stakeholders (mainly represented by clearing service providers) were generally of the view that a too detailed delegated act may render the provision of clearing services unprofitable, would not fit for all possible cases in which such services are provided and would make the management of risks impossible. That could in turn result in increased concentration and a more limited offer, which would not help smaller clients to access clearing services.

Member States replying to the consultation of the EGESC were generally supportive of the approach proposed by the Commission.

Scope

Some stakeholders argued for a limited scope of the obligation to apply FRANDT terms, restricted to transactions covered by mandatory clearing under EMIR. Other stakeholders were of the view that a wider application would avoid an artificial division of services and encourage voluntary clearing. Some stakeholders argued that the obligation to apply

[7] https://www.esma.europa.eu/press-news/consultations/consultation-draft-technical-advice-commercial-terms-providing-clearing

FRANDT terms should be limited to clearing at EU central counterparties ('CCPs') and should not apply to clearing at recognised non-EU CCPs.

Conflict of interests

Some stakeholders submitted that the delegated act should specify further the rules on conflict of interests in Article 4(3a) of EMIR, in particular that staff working in the trade department of a clearing service provider should not intervene in decisions taken in the clearing department, and how clearing service providers should document compliance with those rules.

Transparency of commercial terms and on-boarding process

Some stakeholders favoured an obligation on clearing service providers to publicly disclose a range of different fees on the basis of client categories to increase transparency and comparability of proposals of clearing service providers. Other stakeholders argued that such public disclosure would not be useful because in practice fees would be determined for each client on a case-by-case basis. Several stakeholders underlined that EMIR and Directive 2014/65/EU[8] ('MiFID II') already require certain clearing service providers to publicly disclose costs and fees. They argued that the delegated act should build on and provide added-value in comparison to those requirements.

As to the process leading to the agreement on the commercial terms and setting up operational processes for clearing services ('on-boarding process'), whereas some stakeholders strongly disagreed with an obligation to create a separate website describing in detail the on-boarding process, most stakeholders could agree that a high-level description on the current website of the clearing service providers could be beneficial and increase transparency.

Some stakeholders welcomed the idea of a structured on-boarding process, with three standardised steps ((i) request for proposal; (ii) proposal; and (iii) agreement), which in their view would increase transparency and predictability. Others objected that such structured steps do not reflect the reality of negotiations and would result in inefficiencies. While agreeing that a standardised request for proposal could help smaller clients, they argued that its use should not be mandatory as some clients prefer to use their own requests for proposal, adapted to their needs. For such clients, an obligation to follow a structured on-boarding process would result in additional regulatory burden.

Risk assessment criteria

Some stakeholders expressed concerns that the disclosure of the details of the risk assessment to clients could limit clearing service providers' ability to control risk. Other stakeholders supported a detailed disclosure requirement to allow clients to better understand how the risk assessment applies to them. Some stakeholders underlined that MiFID II already require certain clearing service providers to risk assess clients and argued that the delegated act should build on that requirement. Some stakeholders pointed out that clearing service providers may be prevented from disclosing details of the outcome of an assessment for regulatory or confidentiality reasons.

---

[8] 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).

Fees and passing on costs

Some stakeholders argued that clearing service providers should not be allowed to pass on default fund contributions or negative consequences of the use of resolution tools to clients, as this undermines the role of the clearing member as the risk carrier. Some stakeholders also argued that clients unfairly lack the right to make a claim against clearing service providers because of their default, and that such rights are usually subject to limitations under the terms and conditions.

Structure of agreements

Various stakeholders argued that standard contracts do not exist and - at the same time - opposed publicly disclosing standard documentation elaborated by trade associations such as Futures Industry Association (FIA) or International Swaps and Derivatives Association (ISDA). Other stakeholders argued that a shift to the use of standard contracts, which are amended by schedules or annexes (similar to the structure used for trading agreements) which should be elaborated by trade associations would be helpful and could contribute to shorten currently long, bespoke and complex negotiations and facilitate comparability. At the same time, some stakeholders mentioned that standard contracts are drafted mainly for entities in the banking sector and do not take into account the characteristics of other clients such as asset managers.

Contractual terms

Some stakeholders were of the view that prescriptive requirements in relation to contract terms would reduce clearing service providers' ability to manage risks, without effectively facilitating access to clearing services. Others identified a number of contractual terms which should be addressed in a delegated act. Some stakeholders pointed to a lack of predictability as to whether clearing service providers will accept requests for clearing of transactions ('clearing orders'). They also noted that clearing service providers usually have the right to exercise discretion to suspend clearing, liquidate, terminate or close out client positions and that this right is not limited to default scenarios, without regard to the need for continuity for clients.

Notice periods

Some stakeholders strongly objected to minimum notice periods of six months and argued they would seriously harm a clearing service provider's ability to manage risks. They also argued that such minimum notice periods would be contrary to the principle that an obligation to apply FRANDT terms should not amount to an obligation to contract. Others argued that in particular smaller clients with limited clearing volumes might struggle to find and conclude an agreement with a new clearing service provider if its contract is terminated. A notice period of six months would therefore be welcome as it would increase predictability and avoid situations where clients find themselves without a clearing service provider.

IT requirements and data format

Some stakeholders challenged from the outset the notion that IT requirements would be a barrier to accessing clearing services. They argued, on the contrary, that streamlined IT solutions are part of a clearing service provider's competitive offer, and often clients ask for specific IT solutions (e.g. linked to the client's systems). Other stakeholders favoured a requirement of public disclosure of IT requirements, noting that the different IT solutions of

clearing service providers (and CCPs) often require the implementation of costly manual processing or development of own IT solutions to reconcile data provided by clearing service providers and CCPs.

3. IMPACT ASSESSMENT

In accordance with Article 4(3a), third subparagraph, of EMIR, the Commission is empowered to specify the conditions under which commercial terms for clearing services of clearing service providers are to be considered to be FRANDT.

The Commission has fully considered all representations received, including the technical advice from ESMA, the responses to ESMA's public consultation, the feedback from the EGESC and the public feedback on the draft delegated act published by the Commission, as well as information provided by stakeholders directly to the Commission. On that basis, the Commission is proposing the adoption of this delegated act.

Commission considerations

ESMA's technical advice includes a cost-benefit analysis of the different options it considered. To the extent this delegated act deviates from the ESMA's technical advice in certain targeted ways, it does so to increase proportionality. The Commission's deviations from ESMA's technical advice should limit the regulatory burden and reduce costs for clearing service providers and, thus, the costs of clearing their clients have to pay, while ensuring legal certainty and that clearing services are provided on FRANDT terms with the aim of facilitating access clearing services for such clients.

The Commission has not prepared a separate impact assessment. Nevertheless, this Section presents the policy choices considered by the Commission.

Scope

The scope of Article 4(3a) of EMIR is a question of legal interpretation that goes beyond the Commission's mandate for this delegated act. On the one hand, the provision refers to direct or indirect clearing services, without limitations. On the other hand, it is placed in Article 4, which relates to the clearing obligation. To ensure legal certainty this delegated act should have a clear scope. That scope should in any case not be wider than that of Article 4(3a) of EMIR.

To include all OTC derivatives transactions in the scope of the delegated act could encourage voluntary clearing and contribute to the aim of facilitating access to clearing in a wider sense. At the same time, the requirement to apply FRANDT terms frames the contractual freedom of clearing service providers and that could speak in favour of a more restrictive scope. A scope limited to transactions subject to mandatory clearing would also ensure that counterparties get access to clearing services at FRANDT terms where they are under a legal obligation to clear. On that basis, it would seem proportionate that this delegated act applies only where clearing is mandatory, i.e. where both the OTC derivatives contract and the counterparties to that contract are subject to the clearing obligation. That scope would also clearly be within the scope of Article 4(3a) of EMIR. That the scope of the delegated act is limited to mandatory clearing does not prevent clearing service providers to apply it to the clearing services they offer as a whole where they wish to do so. The limited scope would, thus, not necessarily lead to an artificial divide of clearing services offered by the same clearing service provider.

Given the global nature of clearing services, the Commission considers that it is important to ensure a fair and level playing field between EU clearing service providers and their international competitors where they compete within the single market or where contracts fall in the scope of the clearing obligation. The obligation to clear can be satisfied through both EU and non-EU CCPs that have been recognised in the EU through direct and indirect client clearing using both EU and non-EU clearing service providers. It would therefore seem justified that this delegated act applies – to the extent a transaction is subject to the clearing obligation – to clearing services provided in the EU.

The proposed scope was supported by the Member States replying to the consultation of the EGESC.

Conflicts of interests

Conflicts of interests are covered by Article 4(3a) of EMIR, which says that clearing service providers must '*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…*'. That obligation applies also, where different legal entities belonging to the same group provide the trading and clearing services. EMIR therefore already addresses the main concern expressed by stakeholders that staff working in trade units should not interfere with decisions taken in clearing units. Under EMIR, clearing service providers are obliged to take measures to avoid conflicts of interests, but that can be organised in different ways. The Commission considers that it would be overly prescriptive and unnecessary to specify in the delegated act what procedures clearing service providers should adopt, including taking into account the relationship of different legal entities belonging to the same group, and how they should document that they comply with the rules on conflicts of interests.

Transparency

According to Article 4(3a), third subparagraph, point (a), of EMIR, the delegated act should specify the conditions under which commercial terms are FRANDT based on the fairness and transparency of 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. Furthermore, under point (c) of that subparagraph, the delegated act should specify the conditions under which commercial terms are FRANDT based on 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.

Clear rules as to the information clearing service providers should provide to clients about the commercial terms, including costs, fees and discounts, and the on-boarding process, should ensure transparency and facilitate clearing services on fair and non-discriminatory basis.

<u>Commercial terms</u>

To be FRANDT, commercial terms should be transparent. An extensive obligation to publish detailed price and fee lists, and using a specific and harmonised structure, as proposed by ESMA in its technical advice, at first sight seems to increase transparency and comparability between offers of different clearing service providers. However, the benefits may not be as big as one would first think. Such lists are by their nature indicative, as the final price will

depend on factors that are specific to the client, its clearing profile and the OTC derivative it will clear. Moreover, clearing service providers do not – and should not be obliged to – apply the same price and fee structure (e.g. some, but not all, clearing service providers charge a specific on-boarding fee). Depending on the clearing service provider, some items in such a harmonised price and fee list would therefore be empty, as not applicable. It is therefore doubtful that the comparability of prices and fees would increase. Against that background, and considering that an obligation to publish detailed price and fee list using a specific and harmonised structure would come at a certain cost for clearing service providers, such a prescriptive requirement does not seem proportionate.

Having said that, increased transparency of commercial terms, including prices, fees, discounts, and costs, as well as collateral accepted, applicable haircuts, IT requirements, etc., would ensure that clients can better compare offers of different clearing service providers, and as such will facilitate access to clearing services on fair, reasonable, and non-discriminatory terms. It would therefore seem important that the delegated act lay down certain minimum elements regarding the information clearing service providers have to give to clients, while not fully harmonising the scope and structure of that information. Some stakeholders have pointed out that certain clearing service providers, but not all, already today are under an obligation to publicly disclose conditions, prices, fees, discounts and costs, for clearing services under EMIR and MiFID II and argued that this delegated act could build further on those. The Commission considers that it is important to avoid duplicative or conflicting requirements in different legal acts. To extend, as proposed by ESMA in its technical advice, the disclosure obligation laid down in EMIR to all clearing service providers would keep the regulatory burden to a minimum and ensure a level playing field. It would also ensure that clients are guaranteed transparency as to certain minimum information irrespective of the legal status of the clearing service provider and the disclosure requirements that apply to it under other legislative acts. As the disclosure requirements under EMIR and MiFID II largely cover the same information about conditions, prices, fees, discounts and costs, it would seem sufficient to refer to EMIR in this regard.

However, the Commission agrees with ESMA that, differently from EMIR, it would seem neither necessary nor proportionate to oblige clearing service providers to disclose the information publicly. A bilateral disclosure would have the benefit of ensuring the confidentiality of the information and reducing costs, while at the same time ensuring transparency and that client get access to the information they need and that is relevant for its particular profile.

In conclusion, the Commission considers that it is proportionate and appropriate to require all clearing service providers to comply with the disclosure requirements laid down under EMIR with respect to the general terms and conditions, including prices, fees, discounts, and costs. In addition, they should disclose information on other key commercial terms, such as collateral accepted, haircuts applied, acceptance of orders and suspension of clearing services, liquidation and close out of client positions, notice periods and IT requirements. The information should be disclosed to clients on a bilateral basis, and it should be clear and complete. That approach was supported by the Member States replying to the consultation of the EGESC.

In its technical advice, ESMA also proposed that clearing service provides should be obliged to disclose – ex post and upon request – to national competent authorities the actual fees they have charged. The Commission however, considers that that the supervision of clearing service providers by national competent authorities falls under the competence and

responsibility of the Member States and therefore does not relate to the conditions under which commercial terms for clearing services of clearing service providers are to be considered to be FRANDT. This delegated act therefore does not include such a disclosure obligation on clearing service providers. However, national competent authorities are able to request such information in accordance with their supervisory powers.

On-boarding process

With regard to the on-boarding process, the Commission considers that it would be overly prescriptive to oblige clearing service providers and clients to apply an on-boarding process with three fixed steps, as suggested by ESMA in its technical advice. Such a three-step process would not necessarily accurately reflect the nature of negotiations, could reduce flexibility and create inefficiencies in the negotiation process. Moreover, as the requirement to apply FRANDT terms should not amount to an obligation to contract, clearing service providers should not be obliged to make a proposal in reply to a client's request for proposal and proposals should not be binding. The Commission nevertheless considers that it would be important and proportionate to oblige clearing service providers to provide clarity to clients and inform them in a timely manner whether they intend to present a proposal or not.

Today the on-boarding process may be perceived as opaque and difficult to oversee, in particular for smaller counterparties that lack experience in negotiating contracts for clearing services. Increased transparency in relation to the on-boarding process would therefore seem important. It could help in particular smaller counterparties to prepare, and facilitate negotiations and access to clearing services. It would not be very costly for clearing service providers to describe the on-boarding process on their current websites. The Commission therefore agrees with ESMA that it would seem proportionate to oblige clearing service providers to publish a high-level description of the on-boarding process on their websites, including the main steps and the key documentation client should provide to the clearing service provider with its request for proposal.

As part of an increased transparency of the on-boarding process, the Commission moreover considers that a form for a request for proposal, available on the website of clearing service providers, could help in particular smaller or inexperienced clients and result in more efficient negotiations, as it could help clients to submit better-prepared and complete requests for proposal. The requirement would represent a limited cost for clearing service providers, which would also benefit from such a measure, as better-prepared requests for proposals would be likely to reduce the on-boarding costs also for clearing service providers. To deliver the expected advantages such forms should be complete, and the delegated act should therefore specify the minimum elements to be included therein. It would appear overly prescriptive, however, to impose a certain harmonised structure or use of language, as proposed by ESMA in its technical advice. Moreover, it would also not seem appropriate to oblige all clients to use such form for a request for proposal, as it could result in inefficiencies where clients are already in a business relationship with the clearing service provider, or want to use a request for proposal tailored to their specific needs. Instead, it would seem important to ensure that clients can choose to use such forms where they consider that it is beneficial to them and facilitate access to central clearing. Where clients to do not identify such benefits they should be free to use other forms of requests for proposals or approach the clearing service provider in another way. Such solutions should also be considered to be FRANDT.

The Member States replying to the consultation of the EGESC supported the proposed approach as to the transparency of the on-boarding process and the form for a request for proposal.

Risk assessment

According to Article 4(3a), third subparagraph, points (c) and (d), of EMIR, the delegated act should specify the conditions under which commercial terms are FRANDT based on the risk control criteria for the CSP related to the clearing services as well as the 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.

An obligation on clearing service providers to conduct a risk assessment of clients according to certain predefined criteria could contribute to terms being FRANDT in this regard. To ensure transparency, they could also be required to disclose the details of their risk assessment criteria. Some stakeholders however, pointed out that certain clearing service providers already are under an obligation to risk assess clients and prospective clients under Commission Delegated Regulation (EU) 2017/589[9] ('RTS 6'). The Commission considers that it is important to avoid duplicative or conflicting requirements in different legal acts. To extend, as proposed by ESMA in its technical advice, the obligation laid down RTS 6 to risk assess clients and prospective clients to all clearing service providers would keep the regulatory burden to a minimum and ensure a level playing field. To a certain extent, it would also ensure a harmonised approach to the risk assessment of client across clearing service providers. The increased focus on the risk profile of the client could be expected to facilitate commercial terms based on fair and non-discriminatory risk control criteria, having regard to the related costs and risks.

To ensure further transparency and enable clients to understand how the risk assessment criteria apply to them, clearing service providers could be obliged to disclose the details of the risk assessment to clients, as proposed by ESMA in its technical advice. In this respect, it seems relevant to note that RTS 6 does not require the disclosure of detailed information about the risk assessment to clients. Moreover, to disclose the details of assessments to clients would imply a certain burden and cost for clearing service provides. There is also a potential risk that such detailed disclosure allows clients to circumvent the risk assessment criteria by presenting information differently, or withholding certain data. At the same time, it is not evident that such detailed disclosure would facilitate terms on FRANDT terms, in particular, as clients would only know the details of its own assessment, without being able to compare with the situation of other clients. In conclusion, it would therefore not seem proportionate to impose such a detailed disclosure requirement. Notwithstanding, it would seem important and proportionate that clearing service providers – in particular if the outcome of the assessment is negative – briefly justify the assessment and indicate which of the risk assessment criteria laid down in RTS 6 the client did not pass. Such disclosure should not be overly burdensome or costly for the clearing service provider, and give the client an indication of where its weaknesses lie. That obligation should not affect the clearing service providers' right to

[9] Commission Delegated Regulation (EU) 2017/589 of 19 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading (OJ L 87, 31.3.2017, p. 417).

protection of business secrets and confidential information or legal obligation not to disclose certain information.

The proposed approach to risk assessment was supported by the Member States replying to the consultation of the EGESC.

Fees and passing costs

Given that EMIR stipulates that the requirement to apply FRANDT terms should not amount to price regulation, the levels of fees or what kind of fees clearing service providers should be allowed to charge to clients should not be regulated in this delegated act. Nevertheless, to be fair, reasonable and non-discriminatory, prices, fees, and discounts should be based on objective criteria. Such objective criteria may depend on demand and needs, the volumes cleared or the clearing profile of the individual client. Those Member States that replied to the consultation of the EGESC generally agreed that prices and fees should be transparent and based on objective criteria.

Moreover, it is important that information about prices, fees and discounts, and costs, is transparent. Clear and complete price and fee lists should increase transparency at the stage of negotiation. To ensure such transparency throughout the contractual relationship it would seem proportionate and appropriate that the delegated act obliges clearing service providers to include clear information on prices, fees, discounts, and fees charging costs to clients ('pass-on costs') in writing in the contract between the clearing service provider and the client.

As to pass-on costs, to ensure FRANDT terms, it would also seem important that service providers provide clear information about fees that pass on costs that are related to the provision of clearing services to the client concerned or to clearing services in general (e.g. for IT costs, annual fixed fees, annual licensing fees, fees for different types of account segregation, fees for collateral management).

Certain stakeholders argued that clearing service providers should not be allowed to pass on default fund contributions or negative consequences of the use of resolution tools or clearing service provider default related claims. The Commission however does not consider this delegated act the right place to address this issue, as the rights and obligations in relation to the default of a CCP is regulated in the CCP recovery and resolution regulation[10]. Moreover, Member States laws transposing the Bank Recovery and Resolution Directive (BRRD)[11] and Member States' insolvency law regulate possible claims against clearing service providers because of their default.

Structure of contracts

---

[10] Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 (OJ L 22, 22.1.2021, p. 1).

[11] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

The Commission considers that a requirement to apply a certain structure to clearing agreements, as proposed by ESMA in its technical advice, would be overly prescriptive without providing clear benefits. Standard contracts and master agreements are widely used in the financial industry. They are, however, not necessary to ensure FRANDT terms. To impose the use of schedules and annexes to modify standard contracts might increase transparency, but would at the same time make documents long, as modified parts of the contract would have to repeated in the annexes and schedules. In addition, it should be possible for counterparties involved in clearing of OTC derivatives and trade associations to further develop such standard contracts and master agreements taking into account the different civil laws that apply to them. The Commission, therefore, does not intend to impose a specific structure to clearing contracts. However, the lack of such an obligation should not prevent clearing service providers and clients to move to such a practice on a voluntary basis, if considered useful by both parties.

The Member States in the EGESC generally agreed that there should not be an obligation to use standard contracts.

Contractual terms

According to Article 4(3a), third subparagraph, point (b), of EMIR, the delegated act should specify the conditions under which commercial terms are FRANDT based on factors that constitute reasonable commercial terms to ensure unbiased and rational contractual arrangements.

In this respect, under EMIR, CCPs and clearing members must offer account segregation serviced on reasonable commercial terms[12]. Similarly, under MiFID II, the provision of clearing services by clearing members and clearing firms, and account segregation services by clearing members, have to be offered under reasonable terms[13]. Commission Delegated Regulation (EU) 149/2013[14] and Commission Delegated Regulation (EU) 2017/2154[15] already require clearing members and clients that provides indirect clearing services to provide such services on reasonable commercial terms. The obligation on clearing service providers to provide clearing services on FRANDT terms add to those rules.

One way of trying to ensure that contractual terms are FRANDT, would be to indicate what kind of clauses that are permitted and what kind of clauses that are not. However, such a prescriptive approach would be extremely rigid and it would be impossible to draft clauses that correspond to all possible situations that are to be regulated between the parties to contracts under all possible national laws. Instead, the Commission considers that the increased transparency from complete and full information about the terms and conditions is a

---

12 Article 39(7) of EMIR.

13 Article 17(6) of MiFID II; Article 25 of RTS 6.

14 Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (OJ L 52, 23.2.2013, p. 11), see Articles 2(1) and 4(1) as amended by Commission Delegated Regulation (EU) 2017/2155 of 22 September 2017 amending Delegated Regulation (EU) No 149/2013 with regard to regulatory technical standards on indirect clearing arrangements (OJL 304, 21.11.2017, p. 13).

15 (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements (OJ L 304, 21.11.2017, p. 6).

more suitable avenue to pursue and ensure reasonable commercial terms and unbiased and rational contractual arrangements that are suited to the client. Where a client has questions as to the compliance of certain terms and conditions with FRANDT, the client could approach national competent authorities or pursue with private enforcement. To ensure that terms and conditions are clear and complete, the delegated act would oblige the clearing service provider and the client to lay down the commercial terms for the clearing services in writing. The cost of such an obligation should be minimal, as written commercial terms are the norm today.

In respect of the acceptance of clearing order, the suspension of clearing, or liquidation or close out of client positions, some stakeholders perceive a lack of transparency and predictability. While EMIR recognises that clearing service providers should permitted to control the risks involved in the provision of clearing services, and without regulating the terms as such, it would seem appropriate and proportionate that this delegated act nevertheless oblige clearing service providers to clearly specify the conditions and criteria in the written contract. Contractual terms granting clearing service providers a discretionary right to derogate from those conditions and criteria should not be considered to be FRANDT. A derogation from the agreed conditions and criteria should however be possible, if it is reasonable and duly justified, for example to allow clearing service providers to control the risks involved in the provision of clearing services or to react to developments outside their own sphere of influence. That could be the case, for example because of client default, increased credit risks or market turmoil.

Notice periods

Some stakeholders perceive a lack of transparency and predictability as to the termination of contacts and material changes to contracts by clearing service providers. The termination or suspension of clearing services and material changes to the contract should be regulated in the terms of the contract and be carefully drafted to ensure that they are FRANDT. It would be important that notice periods allow clients sufficient time to find alternative clearing services or to assess material changes to the contract. Against that background, it would not seem overly burdensome to require clearing service providers to apply a notice period of no less than six months. Exemptions should however be possible, where needed to control risks or to react to developments outside their own sphere of influence. That could be the case, for example because of client default, increased credit risks, or in case of the termination or suspension of clearing services of the CCP used by the clearing service provider. Such approach, which was proposed by ESMA in its technical advice, seems balanced and, thus, fair to both counterparties. The EGESC also expressed support to minimum notice periods, on condition that exemption are possible if reasonable and duly justified.

IT requirements

Harmonised and standardised IT solutions and data formats could reduce operational risks and costs. Under the Commission's mandate, this delegated act can, however, only specify the conditions under which commercial terms harmonising and standardising IT solutions and data formats are to be considered to be FRANDT, but not harmonise or standardise such solutions or formats themselves. Stakeholders have opposing views as to who should bear the cost of non-harmonised IT systems and data formats. This delegated act therefore concentrates on transparency regarding IT requirements and their costs rather than regulating such requirements in substance or mandating a certain cost allocation. The Commission

therefore agrees with ESMA that the aspects of IT and data formats may be better solved through a market-led initiative.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 sets out the scope of the delegated act.

Articles 2 sets out that commercial terms are to be considered to be FRANDT where they meet certain requirements, set out in the Annex.

Article 3 contains transitional provisions for existing clients.

Article 4 specifies when the delegated act will enter into force and from when it will apply.

The Annex sets out the requirements that contractual terms must meet to be considered to be FRANDT:

- the transparency of the on-boarding process;

- the form for a request for proposal;

- disclosure of commercial terms;

- risk control assessment;

- the obligation to lay down in the contractual terms in writing;

- fees, prices and pass-on costs;

- the refusal of clearing orders, suspension of clearing services, liquidation or close-out of client positions, and the termination of contracts.

COMMISSION DELEGATED REGULATION (EU) …/...

of 2.6.2021

supplementing Regulation (EU) No 648/2012 by specifying the conditions under which the commercial terms for clearing services for OTC derivatives are to be considered to be fair, reasonable, non-discriminatory and transparent

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[16], and in particular Article 4(3a), third subparagraph, thereof,

Whereas:

(1) Regulation (EU) No 648/2012 has been amended by Regulation (EU) 2019/834 of the European Parliament and of the Council[17]. Those amendments have *inter alia* introduced an obligation on clearing members and clients which provide clearing services, whether directly or indirectly, ('clearing service providers') to provide those services under fair, reasonable, non-discriminatory and transparent ('FRANDT') commercial terms. To provide legal certainty for clearing service providers and their prospective or existing clients, it is necessary to specify the conditions under which commercial terms are to be considered to be FRANDT.

(2) Taking into account that the objective of Article 4(3a) of Regulation (EU) No 648/2012 is to facilitate access to clearing for clients that have a limited volume of activity in the OTC derivatives market and face difficulties in accessing central clearing, and given the importance of accessing central clearing for counterparties subject to the clearing obligation, this Regulation should apply to the provision of clearing services in relation to OTC derivative contracts that are subject to the clearing obligation pursuant to Article 4(1) of Regulation (EU) No 648/2012. To ensure a level

16 OJ L 201, 27.7.2012, p. 1.

17 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 requirement for trade repositories (OJ L 141, 28.5.2019, p. 42).

playing field and that clients in the Union benefit from FRANDT commercial terms, this Regulation should apply where those clearing services are provided in the Union.

(3) To ensure transparency, clearing service providers should describe the process leading to the agreement on contractual terms and setting up operational processes for clearing services ('on-boarding process') and provide a form for a request for proposal on their websites. For the same reason, all clearing service providers should disclose information on key commercial terms to prospective clients.

(4) While clearing service providers should be able to control the risks involved in the provision of clearing services, a harmonised risk assessment of prospective and existing clients should ensure that commercial terms are fair and non-discriminatory, having regard to costs and risks. Some clearing service providers are already under an obligation to assess the risk posed by clients in accordance with the criteria laid down in Article 25 of Commission Delegated Regulation (EU) 2017/589[18]. To ensure a harmonised risk assessment of clients, while reducing the regulatory burden on clearing service providers and avoiding duplicative and conflicting rules, all clearing service providers should assess clients on the basis of the criteria laid down in Article 25 of that Delegated Regulation.

(5) To ensure that commercial terms are reasonable, ensuring unbiased and rational contractual arrangements, fees, prices, and discounts should be based on objective criteria, including volumes cleared, clearing patterns and needs and requirements of a client. To avoid unbalanced pricing structures and conflicts of interests, fees, prices and discounts should be carefully designed. Fees charging costs to clients should clearly distinguish between costs directly related to the provision of clearing services to the client concerned and costs related to the provision of clearing services in general, separately for each cost item, including IT costs, licensing costs and costs for collateral management.

(6) Contractual terms should specify the conditions and criteria for the acceptance of transactions submitted by clients for clearing and for the right of the clearing service provider to suspend clearing services and to liquidate or close out client positions. A derogation from those conditions and criteria should be possible where it is reasonable and duly justified, including to control the risks involved in the provision of clearing services.

(7) To ensure predictability and continuity of clearing services, clearing service providers should apply a notice period of not less than six months for termination of contracts or for changes that materially affect the agreed terms and conditions. A shorter termination period should be possible where it is reasonable and duly justified, including to control the risks involved in the provision of clearing services.

(8) Both prospective and existing clients should benefit from FRANDT commercial terms. Whereas the new conditions will benefit prospective clients from the date of application of this Regulation, clearing service providers and existing clients should be

---

[18] Commission Delegated Regulation (EU) 2017/589 of 19 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading (OJ L 87, 31.3.2017, p. 417).

given sufficient time to review and, where appropriate, adapt commercial terms agreed before the entry into force of this Regulation.

(9) Article 4(3a) of Regulation (EU) No 648/2012 has already entered into force and applies from 18 June 2021. To ensure legal certainty as to the conditions under which commercial terms are to be considered to be FRANDT, this Regulation should enter into force as a matter of urgency. However, to give clearing service providers sufficient time to prepare for the application of this Regulation, its application should be deferred,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

This Regulation applies to clearing members and clients which provide clearing services in the Union, whether those services are provided directly or indirectly ('clearing service providers'), where those services are provided in relation to OTC derivative contracts that are subject to the clearing obligation pursuant to Article 4(1) of Regulation (EU) No 648/2012.

Article 2

Fair, reasonable, non-discriminatory and transparent commercial terms

Commercial terms for clearing services provided by clearing service providers shall be considered to be fair, reasonable, non-discriminatory and transparent where they meet the requirements laid down in the Annex.

Article 3

Transitional provision

Commercial terms for clearing services agreed before … [the date of entry into force of this Regulation] shall be reviewed and, where necessary to meet the requirements laid down in the Annex, modified by … [12 months after the date of entry into force of this Regulation].

Article 4

Entry into force and application

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall apply from [6 months from entry into force].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 2.6.2021

For the Commission
The President
Ursula VON DER LEYEN